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No.

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IN THE

Supreme Court of the United States

TOWN OF ISLIP, THOMAS ISLES, AS COMMISSIONER OF THE TOWN OF ISLIP DEPARTMENT OF PLANNING AND DEVELOPMENT AND CARL P. MALTESE, AS DIVISION DIRECTOR OF THE DIVISION OF BUILDING OF THE TOWN OF ISLIP DEPARTMENT OF PLANNING AND DEVELOPMENT, AND AS TOWN OF ISLIP DIRECTOR OF BUILDING AND HOUSING, PETITIONERS

v.

HOWARD NORTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a property owner who can, but refuses to, petition a zoning board of appeals to determine whether his investment property continues to enjoy nonconforming use status as a two-family dwelling, has failed to present a "final" deprivation of a property interest or a "ripe" civil rights claim concerning the purported "revocation" of such status.

II. Whether the district court and court of appeals erred in concluding that plaintiff established a due process "property right" to continue a nonconforming use of his property as a two-family dwelling, when by operation of controlling state and local law, there is no vested right to continue a nonconforming use after a fire, abandonment of the use or other specified events, and especially where the plaintiff invoked his Fifth Amendment (U.S. CONST., AMEND. V) right against self-incrimination with regard to discovery concerning those very uses and events.

III. After a real estate property owner unsuccessfully challenges in state court a local building department's denial of a permit, which denial was on the basis that the property had apparently lost its nonconforming use status as a two-family dwelling, whether the owner has suffered a cognizable "property" deprivation under the Due Process Clause (U.S. CONST., AMEND. XIV) when the building department makes an alleged "revoking notation" on the

property's certificate of occupancy ("C/O") that the state court challenge had been unsuccessful and that the property had lost its nonconforming use status.

IV. Whether sufficient procedural due process is accorded under *Mathews v. Eldridge*, 424 U.S. 319 (1976), when a local building department makes a notation on a property's C/O without sending further notice to the property owner, where the property owner had participated in the state court proceedings leading to the notation, the prior C/O specifically stated on its face that it should not be relied upon as a guarantee that the rights listed therein continue to exist, and the property owner is still free to later challenge the notation in a local zoning board of appeals proceedings or state court proceeding, in further keeping with this Court's statement in *Phillips v. Comm. of I.R.S.*, 283 U.S. 589, 596-597 (1931) that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate" (*Id.* at 596-97).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS 1

STATEMENT 3

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 23

APPENDIX

CIRCUIT COURT DECISION 1a

DISTRICT COURT DECISION 3a

ORDER DENYING REHEARING 29a

TABLE OF AUTHORITIES

Page

CASES

BD. OF REGENTS V. ROTH, 408 U.S. 564 (1972) 8, 11, 17

BRADY V. TOWN OF COLCHESTER, 863 F.2D 205, 211 (2D CIR. 1988) 10, 21

CIOPPA V. APOSTOL, 301 A.D.2D 987, 755 N.Y.S.2D 458 (3D DEPT. 2003) 14

CITY OF ALBANY V. FEIGENBAUM, 204 A.D.2D 842, 611 N.Y.S.2D 719 (3D DEPT. 1994) 14

DOUGHERTY V. TOWN OF NORTH HEMPSTEAD BD. OF ZONING APPEALS, 282 F.3D 83, 88-89 (2D CIR. 2002) 19

E.P.G. ASSOCIATES V. CITY OF ITHACA ZBA, 257 A.D.2D 744, 682 N.Y.S.2D 724 (3D DEPT. 1999) 14

LICARI V. FERRUZZI, 22 F.3D 344 (1ST CIR. 1994) 10, 21

MATHEWS V. ELDRIDGE, 424 U.S. 319 (1976) 8, 21

MATTER OF HARBISON V. CITY OF BUFFALO, 4 N.Y.2D 553, 559-560, 176 N.Y.S.2D 598 (1958) 13

MATTER OF PELHAM ESPLANADE V. BOARD OF TRUSTEES, 77 N.Y.2D 66, 563 N.Y.S.2D 759 (1990) 12, 13, 15

MITCHELL V. W.T. GRANT CO., 416 U.S. 600, 609 (1974) 23

NESTOR COLON MEDINA V. CUSTODIO, 964 F.2D 32 (1ST CIR. 1992) 10, 21

NEW VENTURE REALTY V. FENNELL, 210 A.D.2D 412, 620 N.Y.S.2D 99 (2D DEPT. 1994) 14

PFZ PROPERTIES V. RODRIGUEZ, 928 F.2D 28 (1ST CIR. 1991) 10, 21

PHILLIPS V. COMM. OF I.R.S., 283 U.S. 589, 596-597 (1931) 7, 8, 21

SCHULTZ MGMT. V. BD. OF STANDARDS AND APPEALS, 64 N.Y.2D 1057, 489 N.Y.S.2D 902 (1985) 16

SWIERKOWICZ V. SOREMA, 2001 WL 246077 (2D CIR. MAR. 12, 2001), REV'D, 534 U.S. 506 (2002) 11

SYRACUSE AGGREGATE CORP. V. WEISE, 51 N.Y.2D 278, 434 N.Y.S.2D 150 (1980) 15

TOYS R US V. SILVA, 89 N.Y.2D 411, 420, 654 N.Y.S.2D 100, 105-106 (1996) 15

VILLAGE OF VALATIE V. SMITH, 83 N.Y.2D 396, 610 N.Y.S.2D 941 (1994) 15

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION V. HAMILTON BANK OF JOHNSON CITY, 473 U.S. 172 (1985) 8, 9, 19, 20

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 3

N.Y. Civ. Prac. L. & R., Art. 78 ..... 5, 22

U.S. Const. Amend. V 1

U.S. Const. Amend. XIV, § 1 2

OPINIONS BELOW

The summary affirmance of the United States Court of Appeals for the Second Circuit was filed on October 9, 2003, and a denial of appellants' combined motion for rehearing and for rehearing *en banc* was filed on December 5, 2003. Both orders are reprinted in the Appendix at 1a and 29a.

The January 8, 2003 opinion and order of the United States District Court for the Eastern District of New York granting in part plaintiff's motion for summary judgment, and published at 239 F.Supp.2d 264, is reproduced in the Appendix at 3a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 9, 2003, and a denial of appellants' combined motion for rehearing and for rehearing *en banc* was entered on December 5, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

U.S. CONST., AMEND. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be

subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND., XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

In this civil rights action under 42 U.S.C. § 1983, the district court granted the plaintiff summary judgment declaring a procedural due process violation to have occurred by virtue of the defendant Town's notation on a certificate of occupancy ("C/O"), without further notice to plaintiff. The complained of notation indicated that the plaintiff had lost a prior state court challenge to the denial of his application for a rental permit, which denial was on the ground that the property had lost its nonconforming use status as a two-family residence, and that the nonconforming use status had been lost. The plaintiff contended that although the rental permit had been denied on the basis of the apparent loss of the nonconforming use status, he did not lose such status because neither he nor the Town thereafter petitioned the Town's local zoning

board of appeals to determine whether he had lost such status.

That is, the plaintiff's entire suit is solely based upon a claimed "revoking notation" made to his C/O regarding the loss of nonconforming use status as a two-family residence, which notation was made as a result of plaintiff's failed state court challenge of the denial of a rental permit. And the entire basis of his claim is a contention that only the zoning board of appeals can formally revoke a nonconforming use.

Remarkably, despite the lower courts' having awarded summary judgment to plaintiff, there was no dispute on the record (nor could there be) that plaintiff purchased the property in question on a distressed basis in foreclosure, and then refused to testify or provide information, on purported Fifth Amendment grounds (U.S. CONST., AMEND. V), with respect to his actual knowledge or use of the property either before he bought the property, or at any time thereafter, including at the time of the so-called "revoking notations." Plaintiff's invocation of the Fifth Amendment was even more incredible given that under controlling principles of state law, and as explicitly indicated on the C/O's themselves, the indication of zoning status such as nonconforming use on a C/O cannot be relied upon for assurance that plaintiff has a vested nonconforming use in perpetuity or until affirmatively "revoked" by the Town.

After plaintiff submitted an application for a rental permit, he was informed by the Town Building Department that because his house had apparently lost its legal nonconforming use status because of a fire and

non-use of the property, he could not obtain a rental permit (JA 377; 378)[1]. Plaintiff brought a state court challenge to the Town's determination under N.Y. CIV. PRAC. L. & R., ART. 78, and the state court dismissed his state court petition. The state court explicitly upheld the denial of the rental permit on the grounds that the Building Department had determined in good faith that plaintiff had lost any prior nonconforming use, unless and until the Town's zoning board of appeals ("ZBA") were to conclude otherwise (JA 467).

Plaintiff thereafter never petitioned the ZBA for any final determination as to whether the nonconforming use status had been lost. This did not render the Building Department's determination, upheld by the state court, a nullity, as the lower courts implicitly concluded, but merely left the Town's initial determination intact as a non-final determination unless and until the ZBA were to rule otherwise.

Given the outcome of the prior state court proceeding, and given plaintiff's failure to go before the ZBA despite the Town's having invited plaintiff to do so, the Building Department then entered an ordinary notation on the property's C/O indicating that the Building Department's non-final determination that the nonconforming use status had been lost due to abandonment remained intact. The C/O notations – which forms the entire basis of plaintiff's procedural due process claim – stated in their entirety as follows:

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[1]JA" references are to the Joint Appendix submitted to the Court of Appeals.

> *Fire to Structure 26 Mar 84 Premises vacated Repair Fire Damage Permit Required Prior to Reoccupancy
>
> *Rental permit for two-family DENIED 23 Mar 88 Non-conforming use of two-family lost due to non-use in excess of one consecutive year and failure to apply for repair permits. Denial sustained by SCS court [Supreme Court, Suffolk County] 27 Feb 89. Withdrawal from Court of Appeals 23 Mar 90.

These notations form the entire basis of plaintiff's claim of a procedural due process violation, because seven years later, after plaintiff allegedly continued to have "tenants" residing at the house (which he described as an "investment property" wherein he does not reside), without even a rental permit, he was issued a summons for violating the last issued C/O (JA 290-291).

Even at this late stage, plaintiff still refused to go before the ZBA, and instead marched into federal court with this civil rights lawsuit. Significantly, the district court and the court of appeals' summary affirmance failed to credit the indisputable fact and law that even at this late stage, plaintiff still could have petitioned the ZBA, which petition alone would have immediately stayed any and all enforcement proceedings until the ZBA were to make its final decision regarding plaintiff's alleged nonconforming use. *See* N.Y. Town L. 265-a(6) (providing that such application to the ZBA automatically stays, as of right and without even the necessity of a motion, all action upon such status, including quasi-criminal and criminal

actions).

Thus, it is simply indisputable that even assuming the Building Department's notations "revoked" plaintiffs' nonconforming use status, which they did not, plaintiff by his own account (i.e., he claims he never even knew about the notations until he received the summons) never suffered any damages and had the absolute and unfettered right to a non-discretionary complete stay of the proceedings on the summons and immediate review by the ZBA, thus triggering this Court's rule of *Phillips v. Comm. of I.R.S.*, 283 U.S. 589, 596-597 (1931), that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Id.*

The district court's ruling and the court of appeals' summary affirmance that the C/O notations constituted a deprivation of procedural due process is in contravention of numerous precedents of this Court, long-standing and heretofore immutable state law zoning principles, and appear to be the first ever to bestow prior notice and pre-deprivation procedural due process protection to notations on C/O's, and perhaps more importantly, the first ever to hold that a nonconforming use status noted on a C/O amounts to a "vested property interest," irrespective of the actual use and abandonment of such use, and despite the property owner's assertion of the Fifth Amendment right against self-incrimination on those core issues.

REASONS FOR GRANTING THE WRIT

Unless this Court grants certiorari, this case will stand for the intolerable proposition that local zoning disputes can be transformed into full-fledged civil rights disputes, even where the plaintiff-landowner asserts the Fifth Amendment, and even where no ripe controversy is presented. Indeed, the lower court, summarily affirmed by the court of appeals, dismissed the plaintiff's substantive due process claim as unripe, and yet proceeded to grant plaintiff summary judgment on his procedural due process claim, based on the supposition that this Court's "ripeness" requirement did not apply, and even though the same underlying property interest was at stake. This Court's intervention is required to avoid the "federalization" of local zoning disputes in situations, particularly where, as here: (a) no deprivation of any "vested property interest" can be shown (*Bd. of Regents v. Roth*, 408 U.S. 564 (1972)); (b) there is a fundamental lack of "finality" and "ripeness" (*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)); and (c) the availability of post-deprivation review is more than adequate to withstand constitutional scrutiny, under the relevant factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and its progeny, and in keeping with the prior holding of this Court in *Phillips v. Comm. of I.R.S.*, 283 U.S. 589, 596-597 (1931) that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Id.*

The new trend reflected in the outcome of this case thus far is for landowners to attempt to transform ordinary local zoning disputes into full fledged civil rights violations, with the attendant maligning of public officials carrying out their duties in good faith, complete with accusations of constitutional wrongdoing (not to mention the high costs of defending such lawsuits). Municipalities, particularly those in suburban areas, are being inundated with lawsuits claiming deprivations of the most tenuous of land use "rights" and "interests" even where, as here, local zoning boards of appeals and state court proceedings have been bypassed and ignored, and even where, also as here, the only "property" interest claimed to have been deprived rests on nothing more than a tenuous "right" and claim to begin with, such as a one-time notation on a certificate of occupancy as involved here. As it has done in the Takings Clause context, there is a genuine need for this Court to actively involve itself in delineating the limits to which routine zoning matters may be heard as procedural due process violations, enforceable through the federal civil rights statute.

This Court's intervention is necessary first to determine and refine the threshold of finality of a zoning related action, such that when a property owner is able to petition a local zoning board for a determination, such petition must be made before a truly "final" and justiciable deprivation can be claimed under the federal constitution. *See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

Second, there is little jurisprudence from this Court concerning one of the most pivotal aspects of all

zoning laws, that being, nonconforming uses which existed prior to the enactment of the zoning law which are conditionally permitted to continue thereafter with the aim of phasing them out over time. Unless this Court intervenes, the district court's decision here, summarily affirmed by the court of appeals, that a property owner enjoys a "vested" due process right to continue a nonconforming use indefinitely until the use has affirmatively been revoked through formal proceedings, even when the property owner has abandoned the nonconforming use or the property has been significantly damaged by fire, will drastically transform the legal status of all nonconforming uses.

Third, this Court can reign in the proliferation of ordinary zoning disputes prosecuted as procedural due process violations, by affirming the rulings of several circuits (including the Second Circuit in a case which the court for unknown reasons declined to apply here), that in the land use context, absent extraordinary circumstances clearly not present here, post-deprivation procedures are more than adequate to satisfy procedural due process requirements. *Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994); *Nestor Colon Medina v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *PFZ Properties v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991); *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988).

Finally, it is important to emphasize that the unpublished and cursory nature of the appellate panel's summary affirmance here – i.e., the panel acknowledged that this was a "complicated case" and then simply stated that they were "in substantial agreement" with the conclusions reached by the district

court, without engaging in any meaningful discussion or analysis – should not deter this Court from exercising full and meaningful review of these important issues. *See* Letter of John M. Walker, Jr., Chief Judge, U.S. Ct. of App., 2d Cir., to Peter G. McCabe, Sec'y of the Committee on Rules of Prac. & Proc., Admin. Office of the U.S. Cts. (Feb. 11, 2004) (available at the Second Circuit website) (citing, *inter alia*, *Swierkowicz v. Sorema*, 2001 WL 246077 (2d Cir. Mar. 12, 2001), *rev'd*, 534 U.S. 506 (2002)).

A. Lack of Vested Property Right

Despite the district court's flawed analysis of this threshold issue, the Town plainly demonstrated that the plaintiff's failure (and abject refusal on purported "Fifth Amendment" grounds) to affirmatively establish that his property in fact continued to qualify for nonconforming use status, under controlling principles of state law constituted an absolute bar to any claim by plaintiff that he possessed a vested "property" right which was deprived, under this Court's ruling in *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *Roth*, the Court held that a civil rights plaintiff claiming a deprivation of a property right must **affirmatively establish** a "legitimate claim of entitlement" to that right. Absent an affirmative showing that the property owner is entitled to legal nonconforming use status at the time of the alleged "deprivation,", *i.e.*, that the use has not been actually discontinued or abandoned as a matter of fact and evidence (and controlling principles of state law), there can be no Due Process deprivation.

Again, despite the district court's flawed analysis of this issue, "nonconforming use" rights are qualitatively different than most property rights. By definition, they exist only for so long as they have not been abandoned or for so long as a fire has not occurred on the structure. *See, e.g.*, Town of Islip Code § 68-15. Under controlling New York law, and apparently the law of most states, the right to a nonconforming use is tenuous and is characteristically different from most property rights. *See Matter of Pelham Esplanade v. Board of Trustees*, 77 N.Y.2d 66, 563 N.Y.S.2d 759 (1990) (nonconforming uses are only "grudging[ly] tolera[ted]" by the law, until such time as they can be "eliminat[ed]"). Thus, it is eminently reasonable, as provided in the Islip Town Code, and as the Town argued in the courts below, that any due process protected "property" interest in a nonconforming use is subject to the precondition that the use has not been abandoned and that a fire has not occurred on the structure. That is to say, a plaintiff cannot claim a deprivation of a vested property interest to continue a nonconforming use, unless he or she **affirmatively establishes** that the use has not been abandoned through non-use and that a fire has not occurred, at least where, as here, the Town contends that these triggering events had occurred. Nevertheless, in this case, the district court treated nonconforming use rights as standing on the same footing as all other property rights, and even went so far as to rule that it made no difference whether plaintiff in fact had discontinued the nonconforming use, or whether plaintiff in fact had abandoned such use before or even after he purchased the formerly rundown property at auction, or whether a fire that was noted on the C/O had in fact extinguished the right to continue any

lawful nonconforming use. Worse still, the district court ruled that these core issues were "irrelevant," and therefore permitted the plaintiff to invoke his Fifth Amendment right to refuse to answer questions or provide discovery in relation to the **actual use** of the property. And, because the district court inexplicably determined that these core issues were "irrelevant," the district court simply failed to consider any of the initial proof submitted by the defendants (unadorned by reason of the plaintiff's assertion of the Fifth Amendment on these very issues) that any lawful nonconforming use had in fact been lost and terminated by operation of law, due to those triggering events (JA 401-451).

These threshold core issues – including whether under the Due Process Clause nonconforming use rights are phased out and terminate by operation of law upon the happening of a fire or discontinuance of the use for a specified period (abandonment), or whether formal "revocation" proceedings must first be instituted to officially "revoke" or terminate such use – is of the utmost importance to the Town of Islip and to all other similarly situated Towns, some of which were granted leave to appear as *amici curia* upon the Town's petition for rehearing to the court of appeals. Under New York law, and apparently the law of most states, the right to a nonconforming use is tenuous at best, and is characteristically different from most property rights. *See Matter of Pelham, supra* (nonconforming uses are only "grudging[ly] tolera[ted]" by the law, until such time as they can be "eliminat[ed]"*); Matter of Harbison v. City of Buffalo*, 4 N.Y.2d 553, 559-560, 176 N.Y.S.2d 598 (1958) ("[T]he policy of zoning embraces the concept of the ultimate elimination of non-conforming uses, and

thus the courts favor reasonable restriction of them").

Because the right to continue a lawful nonconforming use in contravention of the zoning laws by its very definition exists only for so long as there has not been a significant fire, a non-use of the nonconformity for more than one year, or a significant change of use, and because the very aim of nonconforming use laws is to naturally phase out these uses over time, the right is "eliminat[ed]" and "deemed" extinguished by the very happening of a fire, the non-use, or other such event. Indeed, under controlling principles of state law, the right to continue a nonconforming use is immediately lost by the happening of one of the enumerated events – no affirmative "revocation" is required. *Cioppa v. Apostol*, 301 A.D.2d 987, 755 N.Y.S.2d 458 (3d Dept. 2003) ("nonconforming use may be closely restricted such that, *inter alia*, it is deemed abandoned based upon substantial discontinuation"); *E.P.G. Associates v. City of Ithaca ZBA*, 257 A.D.2d 744, 682 N.Y.S.2d 724 (3d Dept. 1999) ("substantial evidence exists to support the determination that petitioner's right to the nonconforming use of the property has been terminated by virtue of overoccupancy and conversion of the premises from two dwelling units to a multiple residence for a period of over 12 months"); *New Venture Realty v. Fennell*, 210 A.D.2d 412, 620 N.Y.S.2d 99 (2d Dept. 1994) (upholding ZBA's finding that "nonconforming use had been terminated by reason of the lack of any manufacturing at the premises for a period of well over one year"); *City of Albany v. Feigenbaum*, 204 A.D.2d 842, 611 N.Y.S.2d 719 (3d Dept. 1994) ("defendants ceased operation as a tavern ..., effectively terminating its preexisting

nonconforming use as a tavern"); *see also Toys R Us v. Silva*, 89 N.Y.2d 411, 420, 654 N.Y.S.2d 100, 105-106 (1996). Indeed, even those courts which have held that a town could not arbitrarily deny a permit to perform a use which had continuously existed prior to enactment of a zoning ordinance, have hastened to add that "our holding in no sense affords petitioner a *carte blanche* to engage in its [nonconforming use]. To the contrary, the town ... may even eliminate this non-conforming use provided that termination is accomplished in a reasonable fashion." *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 434 N.Y.S.2d 150 (1980). Terminating non-conforming uses by operation of law upon the occurrence of an abandonment of the use, a fire, or a change in use, has long been found to be reasonable. *Toys R Us v. Silva*, 89 N.Y.2d 411, 654 N.Y.S.2d 100 (1996); *Matter of Pelham Esplanade, supra.* This is so even though the termination may come about "at the occurrence of an event as unpredictable as the destruction of the non-conforming use by fire." *Village of Valatie v. Smith*, 83 N.Y.2d 396, 610 N.Y.S.2d 941 (1994).

To nevertheless allow a property owner a vested property right, protected by the Due Process Clause, to continue a nonconforming use even after one of these triggering events has occurred, and until a formal "revocation" proceeding has been instituted and concluded, will wreak havoc on the entire zoning law system of land use regulation. Among other things, this could cause municipalities to affirmatively and continually re-inspect every property and building within its borders to timely act to extinguish and "revoke" such rights, lest a property owner later complain that he or she relied upon the "vested"

nonconforming use right before investing in the property. Moreover, the lower courts' rejection of the Town's position that nonconforming use rights terminate by operation of law upon the actual occurrence of certain triggering events (*e.g.*, fire or abandonment for a prescribed period), which position is amply supported by state law, and in the absence of any discernable state law to the contrary, is both intolerable and constitutionally infirm.

Succinctly stated, before a property owner can march into federal court claiming that the already tenuous property right to a nonconforming use has wrongly been wrongfully "revoked" in violation of the Due Process Clause, at the very least he or she must **affirmatively establish** that none of the phasing out or triggering events has occurred such that he or she possesses a "legitimate claim of entitlement" to that **right** under *Roth*. This is especially true where, as here, there was no showing that the use had not been lost as a matter of fact (to the contrary, as noted above, plaintiff refused to testify concerning this issue and invoked his Fifth Amendment right to remain silent), and in fact the Town presented ample evidence establishing that such use had been lost or abandoned, none of which was "irrelevant" as the district court amazingly concluded (239 F.Supp.2d at 274).

The affirmed judgment also directly contravenes established state law concerning the legal effect of a certificate of occupancy alone, and whether a C/O can be claimed to create enforceable property rights to begin with. In *Schultz Mgmt. v. Bd. of Standards and Appeals*, 64 N.Y.2d 1057, 489 N.Y.S.2d 902 (1985), *aff'g for reasons stated in* 103 A.D.2d 687, 477 N.Y.S.2d 351

(1st Dept. 1984), the New York Court of Appeals, applying this Court's dictates in *Roth*, *supra*, specifically held that the mortgagee plaintiffs there could not claim a vested "property" interest in a C/O's notation of a nonconforming use status. Consequently, the plaintiff was not entitled to due process notice and an opportunity to be heard before such status could be noted on the C/O as lost. New York's highest court explained that New York law is markedly different in the "multiple dwelling" context – not applicable here – where the Multiple Dwelling Law specifically provides that parties can rely upon C/O's for the rights enumerated therein, but even then only if such claimed reliance is in good faith.[2]

As confirmed by the *Amici* Towns' brief in support of rehearing below, the question of whether a nonconforming use status noted on a C/O for a single family or two-family dwelling creates a **continuing**

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[2]The plaintiff's property is not a multiple dwelling. Under New York Law, multiple dwellings are highly regulated and are defined as being dwellings certified for three or more family use and which comply with all of the restrictions and regulations contained in the Multiple Dwelling Law. *See* N.Y. MULTIPLE DWELLING L. § 2. The State Legislature made a conscious determination that because of heightened regulation of multiple dwellings, which includes periodic inspections by municipal officials, it is reasonable to require the municipality to affirmatively indicate on a C/O that a nonconforming use right has been lost. N.Y. MULTIPLE DWELLING L. § 301[5]. This obligation does not apply to non-multiple dwellings which are subject to less regulation and concerning which the C/O's specifically indicate they are not a guarantee that changes have not occurred with respect to the status noted therein. Additionally, even multiple dwellings are subject to a good faith reliance prerequisite. *Id.*

"vested property interest," even after the **actual non-use or abandonment** of the property for the statutorily prescribed period of non-use or abandonment, subject only to possible "revocation," is of the utmost importance to municipalities. The direct implications of the ruling herein is to drastically alter the legal landscape, and potentially require an onslaught of "revocation" proceedings where the municipalities have always operated under the correct legal assumption that nonconforming uses no longer exist, and terminate **by operation of law**, as soon as any of these triggering events occur. In fact, that is often, as here, the basis for denying building and rental permits notwithstanding a contrary C/O and even though no prior notice or hearing has been given.

Moreover, with regard to the core issue of whether or not plaintiff, or any other property owner, has a "vested property interest" under *Bd. of Regents v. Roth*, the affirmed judgment stands for the unique and clearly untenable proposition that a property owner can bring a federal civil rights lawsuit, claiming a violation of procedural due process and deprivation of a "vested property interest," without even having to demonstrate factual compliance with the underlying zoning or land use provisions under which plaintiff claims a "vested property right" to begin with. Worse still, once something is noted and/or re-issued on a C/O, a property owner such as plaintiff can assert the 5th Amendment and refuse to answer any questions or offer any evidence regarding the claimed property right other than to hold up the C/O and then remain silent.

The outcome of this case thus far is a clear abomination and distortion of *Roth*'s *"legitimate claim of entitlement"* test, is in complete and utter derogation of this Court's established precedent, and should be given due and proper consideration by this Court.

B. Lack of Ripeness

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which has been applied by the circuit courts beyond the Fifth Amendment Takings context in which it arose, this Court held that a deprivation of a "property" right is not "final" when the plaintiff can petition a zoning board of appeals for a variance. *See also Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88-89 (2d Cir. 2002) ("[t]he ripeness requirement of *Williamson*, although announced in a takings context, has been extended to equal protection and [procedural and substantive] due process claims asserted in the context of land use challenges").

Here, the plaintiff could have petitioned the ZBA to determine whether or not he had lost his nonconforming use status by virtue of a fire which occurred there several years earlier or by virtue of non-use and abandonment of the nonconforming use. In this respect, the jurisdiction of the ZBA under the Town Code and under applicable state law is original and not appellate. *See* TOWN CODE § 68-15; 68-20; *cf.* N.Y. TOWN L. 267-a(4) (ZBA's jurisdiction is appellate "*[u]nless otherwise provided by local law or ordinance*").

Plaintiff could have petitioned the ZBA when he was directly invited to do so by the Building Department when it first denied him rental permits in 1988, or when he was again invited to so petition by the state court which affirmed the denial of rental permits. Moreover, he could have petitioned the ZBA as late as 1997 when he allegedly first learned of the "revoking notations" on his C/O.

Under these circumstances, plaintiff's federal complaint should never have been permitted to persist through discovery, let alone summary judgment in plaintiff's favor, based on fundamental considerations of applicable ripeness and finality principles. *See Williamson, supra.*

C. Adequacy of Available Post-Deprivation or Post-"Notation" Review

Lastly, the plaintiff claimed to have been deprived only of a "property" right, not of a liberty right. He never claimed he stopped using the house as a two-family residence. Nor can he claim that he suffered damages or a "cloud on title" where, as here, he also claims that he never even supposedly knew about the disputed notations. In fact, the plaintiff affirmatively **withdrew** any claims for monetary damages in the course of discovery (although plaintiff has petitioned the lower courts for substantial attorneys' fees as a prevailing party, based on the lower court's determination to such effect, in excess of $500,000) (JA 343).

Under the relevant circumstances, the lower courts should have discerned that the available post-"notation" procedures which were available here fully comported with any due process considerations. In *Phillips v. Comm. of I.R.S.*, 283 U.S. 589, 596-597 (1931), this Court held that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."

Additionally, several circuits (including the Second Circuit, who silently declined to apply its own ruling in this case), have specifically held that in the land use context, availability of post-deprivation review satisfies the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test. *See, e.g., Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994); *Nestor Colon Medina v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *PFZ Properties v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991); *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988). The plaintiff had every right to go before the ZBA, even after his alleged after-the-fact discovery of the "revoking notations" on his C/O, and doing so would have immediately and automatically stayed all action on the summons he had been issued (N.Y. TOWN L. § 265-a).

Notwithstanding that the standard of review on the appeal from the district court's grant of summary judgment in plaintiff's favor was *de novo*, the court of appeals did not engage in *de novo* review with respect to a proper *Mathews v. Eldridge* balancing inquiry. Had the court of appeals done so, it is beyond cavil that it should have discerned that plaintiff was afforded meaningful notice and an opportunity to be heard, and

that the available review before the Town ZBA (N.Y. TOWN L. 265-A), and before the state courts (*see* N.Y. Civ. Prac. L. & R., Art. 78), more than sufficed for due process purposes. By all accounts, plaintiff received specific actual notice of the Building Department's determination that his property had lost its nonconforming use status and that the Building Department expected him to petition the ZBA if he disagreed. This occurred when he was denied a rental permit and was specifically directed to the ZBA (JA 377; 378; 467). Such constituted both notice and an opportunity to be heard before the ZBA. Additionally, under N.Y. TOWN L. 265-A, the plaintiff had the absolute and unfettered right to petition the ZBA either to establish the continuance of the nonconforming use, or to complain and seek review immediately upon his first learning of the so-called "revoking notations" on his C/O, whenever that occurred. This holds true even assuming *arguendo* that no "prior notice" of the "revoking notations" had been given. Indeed, plaintiff had the extraordinary and absolute legal right under state law to unilaterally stay all proceedings upon the notation, including staying criminal and quasi-criminal zoning enforcement proceedings, merely by submitting the ZBA petition. N.Y. TOWN L. 265-A.

A final consideration is likewise of significant concern to the defendant Town, and to all other similarly situated towns and local municipalities. This entire lawsuit is premised upon a notation made to a C/O which had the aim of noting the outcome of judicial proceedings which, at least according to the unimpeached testimony of the Building Official who made the notation, affirmed the denial of a rental

permit based upon the Building Department's finding that the nonconforming use right had been lost, or at the very least had apparently been lost. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609 (1974) (due process will sometimes allow for post-deprivation proceedings when what is involved are "ordinarily uncomplicated matters that lend themselves to documentary proof"). When the purpose of a notation is to note the outcome of a prior court proceeding, wherein the property owner fully participated, the need for further pre-notation notice is minimal, while it imposes a further and unnecessary level of administrative complication to require a pre-notation notice and a hearing, none of which was properly weighed or balanced by the lower courts.

CONCLUSION

This Court should grant the petition.

Respectfully Submitted,

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(Any footnotes trail the end of each document)

No. 03-7066

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HOWARD NORTON,
Plaintiff-Counter-Defendant-Appellee,

v.

TOWN OF ISLIP, THOMAS ISLES, as Commissioner of the Town of Islip Department of Planning and Development and CARL P. MALTESE, as Division Director of the Division of Building of the Town of Islip Department of Planning and Development, and as Town of Islip Director of Building and Housing,
Defendants-Counter-Claimants-Appellants.

October 9, 2003, Decided

COUNSEL: For Defendants-Counter-Claimants-Appellants: EDWARD M. ROSS, Rosenberg Calica & Birney LLP (Judah Serfaty, on the brief), Garden City, NY

For Plaintiff-Counter-Defendant-Appellee: THOMAS L. COSTA, Melville, NY.

JUDGES: PRESENT: HON. RICHARD J. CARDAMONE, HON. ROGER J. MINER, HON. GUIDO CALABRESI, Circuit Judges.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

In this complicated case dealing with whether the Town of Islip afforded the plaintiff procedural due process when it issued a certificate of occupancy ("C/O") that contained certain "revoking notations" concerning the plaintiff's right to a nonconforming use in his property, we find ourselves in substantial agreement with the following conclusions reached by the district court in its order:

that the Town did violate plaintiff's right to procedural due process; that plaintiff is awarded attorneys fees as the prevailing party pursuant to 42 U.S.C. § 1988; that plaintiff's application is granted for a declaratory judgment recognizing that the 1990 C/O was the validly issued C/O for the premises and that the premises will continue to enjoy its status as nonconforming until the Town revokes its status in a manner conforming with requirements of due process; that plaintiff's application is denied for a permanent injunction against the Town from taking any action to punish or prohibit plaintiff from using the premises as a two-family dwelling; that plaintiff's substantive due process claim is dismissed; and that the defendants' motion for summary judgment is denied.

We have considered all of the defendants' arguments and find them to be without merit. The district court's judgment is therefore AFFIRMED.

CV 98-06745 (NGG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

HOWARD NORTON,
Plaintiff,

v.

TOWN OF ISLIP, et al.,
Defendants.

January 2, 2003, Decided

COUNSEL: For Howard Norton, PLAINTIFF: Thomas L Costa, Melville, NY USA.

For Town of Islip, DEFENDANT: Robert M Calica, Rosenberg Calica & Birney LLP, Garden City, NY USA.

For Thomas Isles, Carl P Maltese, DEFENDANTS: Edward M Ross, Rosenberg Calica & Birney LLP, Garden City, NY USA.

For Town of Islip, Thomas Isles, Carl P Maltese, COUNTER-CLAIMANTS: Edward M Ross, Rosenberg Calica & Birney LLP, Garden City, NY USA.

For Howard Norton, COUNTER-DEFENDANT: Thomas L Costa, Melville, NY USA.

JUDGES: Nicholas G. Garaufis, United States District Judge.

OPINIONBY: Nicholas G. Garaufis

OPINION:

MEMORANDUM AND ORDER

GARAUFIS, United States District Judge.

Plaintiff Howard Norton brings this action under 42 U.S.C. § 1983, alleging that the above-captioned Defendants violated his due process rights when they revoked his right to maintain a legal nonconforming use of his property without notice and an opportunity to be heard. The parties have filed cross motions for summary judgment. For purposes of efficiency, I consider these motions together.

FACTUAL BACKGROUND

The following facts are undisputed unless otherwise noted. Plaintiff is the owner of a house (the "Premises") in Central Islip which was converted by previous owners into a two-family dwelling in 1933. (Memorandum of Law In Support of Plaintiff's Motion for Summary Judgment ("Pl. Mem."), at 2.) At the time the original improvements were made, the two-family use was maintainable as a matter of right under the laws of the Town of Islip (the "Town"). (Id. at 3.) Sometime after 1933, the Town adopted an ordinance that zoned the Premises in an area restricted to single-family detached dwellings. (Id.) However, it also issued

a letter on April 27, 1965, recognizing the two-family dwelling as a legal non-conforming use. n1 (Id.)

On November 21, 1986, Plaintiff purchased the Premises in reliance upon a certificate of occupancy ("C/ O") in the Town's records that certified the Premises as a legal nonconforming two-family dwelling. n2 (Id. at 4.) After the purchase, a Town official advised Plaintiff that he needed to obtain a rental permit in order to rent the Premises. (Id. at 4-5.)

On March 23, 1988, Plaintiff submitted an application to the Town for a rental permit. (Pl. Mem., at 5.) In response, the Town issued a barrage of contradictory signals regarding Plaintiff's nonconforming use. On April 13, 1988, the Town issued a new C/ O certifying the Premises' status as a legal nonconforming two-family dwelling. n3 (Declaration of Thomas Costa in Support of Plaintiff's Motion for Summary Judgment ("Costa Decl."), Ex. G.) However, the Town denied the application for a rental permit and also sent a brief letter dated May 14, 1988 to Plaintiff informing him that the Town "had studied your file and has determined that you must go before the Board of Appeals, with regard to your non-conforming use. I suggest you file an application at the Permit counter at the earliest possible date." (Declaration of Timothy Shea in Support of Defendants' Motion for Summary Judgment ("Shea Decl."), Ex. K.) Following the issuance of that letter, the Town again issued at Plaintiff's request two C/ O's on May 23, 1988 and October 28, 1988, certifying the Premises as a legal nonconforming two-family dwelling. (Pl. Mem., at 5.) Each C/ O stated:

This certifies that the above property contains the following improvements which conform substantially with the terms and requirements of the New York State Building Code and the Town of Islip Zoning Ordinance at the time of construction and that the Premises may be occupied for the purpose as stated: Two Family Dwelling (nonconforming use) ... (Shea Decl., Ex. W.)

Each C/ O also carried a notation at the bottom providing:

This certificate will be null and void if the improvements are altered in any manner or additions are made thereto without authorization from the Town of Islip Division of Building. (Id.)

Although it appears that the Town had doubts about the continuing validity of Plaintiff's nonconforming use, it is clear that the Town took no official action to revoke the nonconforming use status. Nor did Plaintiff initiate any proceedings with the Board of Appeals. Instead, Plaintiff commenced in September 1988 an Article 78 proceeding seeking to compel the Town to issue a rental permit. (Id.) During these proceedings, the Town justified its denial of Plaintiff's rental application on the ground, among others, that the Premises had lost its status as a nonconforming use after a fire damaged the home in 1984 and prompted the previous owners to leave it vacant for over a year. As a basis for this argument, the Town cited § 68-15 of the Town Code, which provides:

Discontinuance of any non-conforming use for a period one (1) year or more terminates such non-conforming

use of a structure or premises, and thereafter said structure or premises shall not be used, except in conformity with provisions of this ordinance.

In making this argument, the Town acknowledged that it had not officially revoked Plaintiff's nonconforming use and that the validity of the use still needed to be determined by the Town's Zoning Board of Appeals. (Id.) The Supreme Court of New York denied Plaintiff's Article 78 petition, but offered no opinion as to the status of the Premises' legal nonconforming use. (Shea Decl., Ex. S.) Months later, on January 3, 1990, the Town again issued at Plaintiff's request a C/ O certifying the Premises' established status as a legal nonconforming two-family dwelling. (Pl. Mem., at 4.)

During the period between 1989 and 1997, the Town never initiated any administrative proceeding before the Zoning Board of Appeals or commenced any other proceeding to terminate the nonconforming use. Nor did the Town ever formally notify Plaintiff that his property's legal nonconforming use had been terminated. Indeed, up to the present time, the Premises continues to be annually assessed and taxed by the Town as a legal two-family residence. (Id.)

On March 20, 1997, seven years after the conclusion of the Article 78 proceeding, the Town served Plaintiff with an Accusatory Instrument charging him with violating § 68-40 of the Town Code, which states "No occupancy or use shall be made of land or a building that is not consistent with the last-issued certificate of occupancy for such building or use of land unless a permit is secured." (Id. at 6-7.) n4

During discovery for the criminal proceeding, Plaintiff requested the last-issued C/ O, and in response the Town's Director of Building and Housing issued a new C/ O for the Premises dated October 21, 1997 that included the following revoking notations:

* Fire to Structure 26 Mar 84 Premises Vacated Repaired Fr Damage Permit Required Prior to Reoccupancy

* Rental permit for two-family DENIED 23 Mar 88 Non-conforming use of two-family lost due to non-use in excess of one consecutive year and failure to apply for repair permits. Denial sustained by the SCS court 27 Feb 89. Withdrawal from Court of Appeals 23 Mar 90.

(Id. at 7.)

Plaintiff later learned during discovery in this § 1983 action that the Town's Commissioner of Building and Engineering added the above determinations to Plaintiff's 1990 C/ O shortly after that C/ O was issued. The notations were made without giving Plaintiff notice or an opportunity be heard.

Plaintiff filed this § 1983 action in October, 1998, seeking (1) monetary damages, (2) attorneys fees, (3) a declaratory judgment recognizing the 1990 C/ O as the last validly issued C/ O for his premises and declaring that the Town's criminal prosecution of Plaintiff is unconstitutional, and (4) an injunction against Town officials from taking further action to punish or prohibit Plaintiff from using the Premises as a two-family dwelling. (Pl. Compl., P 49.) In October 2000, Plaintiff and the Town entered into a stipulation withdrawing

Plaintiff's claim for monetary damages. The stipulation was made on condition that the Town delay the criminal proceedings against Plaintiff pending resolution of his constitutional claims. (Costa Decl., Ex. BB, 87-91.) To date, the Town has consented to a succession of adjournments of the criminal action.

DISCUSSION

In their cross motions for summary judgment, the parties dispute whether the Town violated Plaintiff's procedural and substantive due process rights when it revoked Plaintiff's noneonforming use without notice and a hearing. For the reasons set out below, I grant Plaintiff's motion for summary judgment with regard to his procedural due process claim, and dismiss Plaintiff's substantive due process claim.

I. Standard of Review

A grant of summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)). The moving party carries the burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In deciding a motion for summary judgment, the court must construe the facts in the light most favorable to the nonmoving party, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and all reasonable inferences and ambiguities must be resolved against the moving party. Flanigan v. Gen. Elec. Co., 242 F.3d 78, 83 (2d Cir.2001).

II. Ripeness

On November 8, 1999, Judge Seybert, to whom this case was previously assigned, ruled that Plaintiff's procedural due process claim was ripe for review. However, Judge Seybert made no ruling as to whether Plaintiff's substantive due process claim was properly before the court. Although the Defense has not raised this issue in its motion for summary judgment, I consider it sua sponte and find that Plaintiff's substantive due process claim is not ripe for review.

To meet the ripeness requirement, a plaintiff alleging that the state has deprived him or her of property in violation of his or her substantive due process rights must show that (1) a state regulatory entity has rendered a "final decision" on the matter, and (2) the plaintiff has sought just compensation by means of an available state procedure. Dougherty v. Town of Hempstead Board of Zoning Appeals, 282 F.3d 83, 89 (2d Cir. 2002). In Dougherty, plaintiff brought substantive and procedural due process challenges to the defendant town's revocation of his alteration permit. Citing Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985), the court held that the state regulatory entity had not rendered a "final decision" on the matter since the plaintiff had failed to apply for a variance. It therefore dismissed plaintiff's claim as unripe. See also, Weissman v. Fruchtman, 658 F. Supp. 547 (S.D.N.Y. 1987).

In the case at bar, Plaintiff has similarly failed to obtain a final decision regarding his nonconforming use from the Town's Zoning Board of Appeals. I therefore find

that his substantive due process claim is not properly before the court.

A finding that a substantive due process claim is unripe may render a related procedural due process claim unripe as well. See Dougherty, 282 F.3d at 87-89 (dismissing plaintiff's procedural due process claim because it was incidental to a the unripe substantive claim.) However, unlike the plaintiff in Dougherty, the Plaintiff in this case requests relief that is grounded almost entirely on his procedural due process claim. Plaintiff does not seek to compel issuance of a C/ O which might still be issued by a Zoning Board of Appeals, but merely requests that the court invalidate a C/ O that has already been issued in violation of his procedural due process rights. Because the gravamen of Plaintiff's complaint lies with the procedural due process claim, I find that the procedural claim is ripe for review.

III. Procedural Due Process Claim

To establish a violation of his procedural due process rights, Plaintiff must show that (1) he possessed a protected property interest as defined by state law; (2) he was deprived of that interest under color of law; and (3) this deprivation occurred without due process of law. See Green v. Town of Blooming Grove, 879 F.2d 1061, 1064 (2nd Cir.1989). Defendants assert that Plaintiff has satisfied none of these three requirements. In particular, the Defense argues (1) that Plaintiff's nonconforming use terminated by operation of law well before the Town issued the 1997 C/ O, and that the Town therefore never took any affirmative action revoking Plaintiff's property interest, (2) that Plaintiff

was not entitled to predeprivation due process, (3) that Plaintiff received predeprivation due process, (4) that Plaintiff's assertion of his Fifth Amendment privilege against self-incrimination precludes summary judgment against the Town, and (5) that the court should abstain from adjudicating this action. I address these arguments in turn.

A. Constitutionally Protected Property Interest

In New York, it is well established that a nonconforming use that predates the enactment of a restrictive zoning ordinance is a vested right entitled to constitutional protection. See Town of Somers v. Camarco, 308 N.Y. 537, 541 127 N.E.2d 327 (N.Y. 1955); Keller v. Haller, 226 A.D.2d 639, 641 N.Y.S.2d 380 (2d Dept. 1996).

In the case at bar, it is undisputed that the Plaintiff's two-family home constituted a legal nonconforming use prior to a fire that damaged the Premises in 1984. Two issues, however, do remain contested. I first consider whether the Town's decision to issue a new C/ O in 1997 constituted a revocation of Plaintiff's nonconforming use, or merely reflected that the nonconforming use was terminated by operation of law after allegedly being abandoned.

Section 68-15 of the Town Code provides:

"Discontinuance of any non-conforming use for a period one (1) year or more terminates such non-conforming use of a structure or premises, and thereafter said structure or premises shall not be used, except in conformity with provisions of this ordinance."

The Defense claims that Plaintiff's nonconforming use terminated by operation of § 68-15 as soon as the Premises was allegedly left vacant for a period of one year after the 1984 fire. Defendants further assert that the Town in 1997 revoked no interest belonging to the Plaintiff because Plaintiff had no interest left to revoke. The problems with Defendants' argument are numerous. First, the court does not read § 68-15 to provide that nonconforming uses terminate by operation of law without any official determination of abandonment. Rather, § 68-15 merely provides that abandonment constitutes "just cause" for terminating a nonconforming use. This interpretation is buttressed by § 68-20 of the Town Code, which provides:

upon confirmation by the Board of any legal nonconforming use, a Building Inspector or other persons charged with the issuance of certificates of occupancy and/ or certificates of compliance shall issue said document with an endorsement specifying the legal nonconforming use, and said document shall constitute presumptive use in any action or proceeding brought under this ordinance. (Italics added.)

Under § 68-20, the issuance of a C/ O recognizing a nonconforming use raises a presumption that a premises is being used as a nonconforming use. Thus, for the Town to terminate Plaintiff's nonconforming use under § 68-15, it must first overcome the presumption established under § 68-20.

Moreover, even if the ordinance were somewhat ambiguous in this regard, the court would be loath to interpret the Town Code as providing such an ephemeral property right, both because zoning

restrictions affecting nonconforming uses are to be strictly construed in favor of the property owner, See Stephentown Concerned Citizens v. Herrick, 246 A.D.2d 166, 676 N.Y.S.2d 246 (3d Dept. 1998), and because such an interpretation might render the Town Code unconstitutional. See I.N.S. v. St. Cyre,533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001) (If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, court is obligated to construe the statute to avoid such problems.) n5

I also note that Defendants have provided no legal support for the proposition that the property right here in question, one which vested as a result of the issuance of an official Town permit and which has been relied on by the owner in expending significant investments, may terminate by operation of law, without any affirmative act by the Town. The criminal cases cited by Defendants are inapposite as they all involve an alleged nonconforming use that had never been established and/ or recognized by the municipality. People v. Sudierfi Reality Corp., 101 N.Y.S.2d 792 (Sp.Sess. 1951); City of New Rochelle, on Complaint of Dassler v. Dandry, 191 Misc. 977, 79 N.Y.S.2d 126 (City Ct. 1948); People, on Complaint of Kelly v. Sheil, 26 N.Y.S. 2d 188 (N.Y.. Mag. Cat 1941); People, Complaint of Lewis v. Lollender, 169 Misc. 995, 10 N.Y.S.2d 252, 169 Misc. 995, 10 N.Y.S.2d 252 (Co.Ct., Nassau County 1939). Accordingly, I find that the Town's issuance of the 1997 C/ O constituted an affirmative act revoking Plaintiff's property right in his nonconforming use.

The second issue before the court concerns the requirements of Plaintiff's prima facie case. It is well established that Plaintiff must show he possessed a property right that was terminated by the Town. However, the parties disagree as to whether Plaintiff must prove that his nonconforming use was not abandoned after the 1984 fire, or alternatively, whether it is sufficient to prove that the nonconforming use existed prior to the events that led to the Town's finding of abandonment.

Defendants correctly state that Plaintiff carries the burden of proving that he held the nonconforming use when it was revoked in 1997. However, except for this simple point of law, the Town's argument is devoid of merit. The Town states that its decision to terminate Plaintiff's nonconforming use was based upon a determination that Plaintiff's premises was left vacant for a period in excess of one year. It further contends that this determination of abandonment is not subject to the strictures of due process because a determination of abandonment means that Plaintiff no longer possesses a property right that is protected by the Due Process Clause. Using this tautology, the Town could deny due process to any land owner with impunity so long as it could later prove that the factual determinations it made were correct. Indeed, the Town's papers appear to argue that the harmless error doctrine may be used as a shield against procedural due process claims challenging the state's deprivation of property rights. This argument completely misconstrues the spirit of the Due Process Clause, which creates an independent right to notice and a hearing in the context of state deprivations of property rights without respect to the underlying merits of a

case. See Farrar v. Hobby, 506 U.S. 103, 112, 113 S. Ct. 566, 573, 121 L. Ed. 2d 494 (1992) ("The awarding of nominal damages for the 'absolute' right to procedural due process 'recognizes the importance to organized society that [this] right be scrupulously observed' while 'remaining true to the principle that substantial damages should be awarded only to compensate actual injury.' ... Thus, Carey, obligates a court to award nominal damages when a plaintiff establishes the violation of his right to procedural due process but cannot prove actual injury.") (quoting and citing Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252 (1978); Westborough Mall, Inc. v. City of Cape Girardeau, Mo., 794 F.2d 330, 339 (8th Cir.1986) (rejecting notion that the deprivation of procedural due process rights is not in itself injury without more and stating "a plaintiff whose constitutional rights have been violated is entitled to a finding of liability and nominal damages even if no compensatory damages are shown."); Matter of Boomgarden, 780 F.2d 657 (7th Cir.1985) ("in bankruptcy proceedings, both debtors and creditors have a constitutional right to be heard on their claims, and "the denial of that right to them [is] the denial of due process which is never harmless error."); Stone v. F.D.I.C., 179 F.3d 1368, 1376-1377 Fed.Cir. (1999) (finding in context of employee termination hearing that ex parte communications made with official presiding over hearing violates employee's right to procedural due process without respect to merits of the case.); Silva v. Sanford, 1998 U.S. Dist. LEXIS 5905, 1998 WL 205326 (S.D.N.Y. 1998) (plaintiff still entitled to nominal damages for procedural due process violation even if it was harmless with regard to underlying decision.). See also, Ryder v. United States, 218 Ct. Cl. 289, 585 F.2d 482, 488 (Ct.

Cl. 1978) (refusing to apply harmless error test: "Where a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay, the court has regularly taken the position that the defect divests the removal (or demotion) of legality, leaving the employee on the rolls of the employing agency and entitled to his pay until proper procedural steps are taken toward removing or disciplining him. In that situation, the merits of the adverse action are wholly disregarded.").

The Town does not dispute that Plaintiff held a property right in his nonconforming use prior to the event that formed the basis of its determination to terminate the nonconforming use. Accordingly, I find Plaintiff has proven that he possessed a property right in his nonconforming use and that the Town revoked this property right when it issued a new C/ O for the Premises in 1997.

B. Defendants' Obligation To Provide Predeprivation Due Process

Defendants claim that the availability of post-deprivation judicial review in the state courts bars a procedural due process claim. However, the Defense fails to explain the basis for this conclusory statement and instead curtly refers the court to Brady v. Town of Colcherster, 863 F.2d 205 (2d Cir. 1988), which involves the application of the inapposite Parratt/ Hudson rule regarding "random and unauthorized" conduct. As the court can find no conceivable basis for the Defense's application of Brady, it prefers to rely on case law which does provide Plaintiff with the right to predeprivation due process.

Under Mathews v. Eldridge, the court weighs three factors to determine what procedural protections the Constitution requires in a particular case: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

Applying this test, courts have usually held that the Constitution requires some kind of a hearing before the State deprives a person of liberty or property. In Zinermon v. Burch, 494 U.S. 113, 132, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990), the Court held: "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking ... Conversely, in situations where a pre-deprivation hearing is unduly burdensome in proportion to the liberty interest at stake ... or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process." (citations omitted). See also, Tri County Industries, Inc. v. District of Columbia, 322 U.S. App. D.C. 412, 104 F.3d 455 (D.C. 1997) (holding that District violated plaintiff's procedural due process rights when it summarily suspended plaintiff's building permit.)

Applying the Mathews factors to the case at bar, I find that the Town did owe Plaintiff predeprivation notice and an opportunity to be heard. First, Plaintiff has a significant property interest in using his premises as a two-family dwelling. Second, the Town's decision to revoke Plaintiff's permit is fraught with at least some risk of erroneous deprivation. According to the C/O issued in 1997, the primary reason for revoking Plaintiff's nonconforming use arose from the Town's conclusion that the nonconforming use had been abandoned for a period in excess of one year. (Costa Decl., Ex. FF.) Plaintiff has provided evidence that the nonconforming use was not abandoned for over a period of one year, and he should have been able to present this evidence to the Town prior to revocation of his property interest. The 1997 C/ O also states that his nonconforming use was revoked because Plaintiff "failed to apply for repair permits." (Id.) The meaning of this statement remains unclear to the court, but it appears to be incidental to the abandonment claim. Even if it were not, Plaintiff may have been able to convince the Town that he had good cause for failing to apply for the repair permits or that he in fact had applied for them. Finally, I disagree with the Town that the requirements of due process, minimal as they are, would be unduly burdensome. In this respect, I note that a full-fledged predeprivation evidentiary hearing would probably be unnecessary for purposes of satisfying the Town's due process obligations. I also note that § 68-20 of the Town Code already requires the Town to hold a hearing prior to approving new nonconforming use applications. It is simply not credible that the Town can hold these preapproval hearings for unestablished nonconforming uses, but cannot hold a hearing prior to terminating a vested

property right that has already been officially recognized. Accordingly, I find that the Due Process Clause did require the Town to provide Plaintiff with notice and an opportunity to be heard prior to terminating his nonconforming use.

C. Defendants Failed To Provide Predeprivation Due Process

The Town further contends that it provided Plaintiff with notice and an opportunity to be heard prior to terminating his nonconforming use. The Town asserts that "the record establishes that a prior notice requirement is unnecessary in general because the property owner is already aware prior to the time a notation is placed on his C/ O either (1) that the Town has previously denied him a permit on the basis that the non-conforming use has been lost or (2) that the property has sustained substantial fire damage resulting in a loss of the use." (Def. Mem., at 12.)

These facts, even if taken as true, do not support Defendants' contention that it comported with the requirements of due process. For even if Plaintiff knew that the Town recognized the flaws in his entitlement to a nonconforming use, such knowledge does not put Plaintiff on notice that the Town was preparing to undertake an official action to revoke his property right. The same logic holds true as to Plaintiff's personal knowledge of the 1984 fire. However, in this regard, I add that Plaintiff's knowledge of the fire is irrelevant since the 1997 C/ O did not cite the fire as a basis for terminating his nonconforming use.

D. Statute of Limitations

Defendants urge the court to deny Plaintiff's motion for summary judgment because a disputed issue of material fact remains as to whether Plaintiff's suit is time barred. Like Defendants' previous arguments, this argument rests on the mistaken assumption that Plaintiff suffered an injury during the 1980s. This is clearly not the case. Rather, Plaintiff's injury-the termination of his nonconforming use, occurred when the Town officially revoked his nonconforming use by issuing a C/ O to that effect in 1997. Plaintiff filed this suit in 1998, well within the applicable statue of limitations. n6

E. Fifth Amendment

Defendants argue that summary judgment in favor of the Plaintiff is inappropriate because Plaintiff asserted his Fifth Amendment privilege against self-incrimination in response to several questions at his deposition. In particular, Plaintiff refused to answer questions as to (1) whether he rented the Premises prior to 1990, (2) whether he altered the Premises prior to 1990, (3) whether he had knowledge that his premises had lost its nonconforming use prior to 1990, and (4) whether he had knowledge that his premises had been vacant for more than one year following a fire in 1984. (Shea Decl., Ex. I [Norton Dep. 67, 69, 137, 149, 150, 153].) Plaintiff refused to answer these questions both on grounds of relevancy and privilege. (Id.)

I find that Plaintiff's assertion of his Fifth Amendment privilege did not "substitute for evidence that would assist the Town in meeting its burden of production."

See U.S. v. Rylander,460 U.S. 752, 75 L. Ed. 2d 521, 103 S. Ct. 1548 (1983). The questions Plaintiff refused to answer were irrelevant to the issue of whether Plaintiff's property enjoyed an officially recognized nonconforming use prior to 1984, whether the Town revoked this interest prior to 1997, and whether the 1997 revocation comported with the requirements of due process. Plaintiff's assertion of his Fifth Amendment right therefore does not prejudice his motion for summary judgment.

F. Younger Abstention

Defendants argue that the doctrine of abstention articulated in Younger v. Harris,401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), compels the court to dismiss Plaintiff's action because it arises out of the same facts and circumstances now the subject of a state criminal proceeding. In his response, Plaintiff contends that Younger and its progeny do not bar federal courts from adjudicating cases where, as here, the state defendant has consented to the adjournment of state criminal proceedings pending resolution of a related civil action in federal court. n7

The Supreme Court held in Younger that a federal court, in the absence of extraordinary circumstances, must not interfere with a pending state criminal prosecution. See Id. at 46. This rule is the necessary corollary to a system "in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the

legitimate activities of the States." Id. at 44. Younger thus expresses equitable principles of comity and federalism that are "designed to allow the State an opportunity to set its own house in order when a federal issue is already before a state tribunal." Ohio Bureau of Employment Services v. Hodory,431 U.S. 471, 479-80, 52 L. Ed. 2d 513, 97 S. Ct. 1898 (1977) (internal quotations omitted).

Younger does not, however, establish an inflexible rule of abstention. Rather, in Hodory, the Court stated: "It may not be argued ... that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." Hodory, 431 U.S. at 480. Although the state defendant in Hodory expressly waived its abstention claim, the Court's decision is equally applicable where a state defendant by its consistent conduct over an extended period implicitly indicates a willingness to submit to a federal forum.

In the case at bar, I find that the Town has indicated a willingness to submit to a federal forum. For five years, the Town of Islip has delayed prosecution of the criminal proceeding against Plaintiff with the apparent intention of allowing this court to first rule on Plaintiff's constitutional claims. n8 (Costa Decl., Ex. BB, 87-91.) On October 26, 2000, the Town even agreed to make the indefinite adjournment of the criminal proceedings a predicate to Plaintiff's stipulation to withdraw his claims for monetary damages in this action. Now, after failing to raise the issue of abstention in its motion to dismiss, its answer and its motion for summary

judgment, the Town urges the court to stay its hand while the Suffolk County District Court proceeds with the five-year old criminal action against Plaintiff. This eleventh-hour request strikes the court as a dilatory tactic intended to further prolong a course of litigation that has needlessly consumed a vast amount of resources-all because the Town has been unable to afford Plaintiff the most rudimentary elements of due process.

In light of the facts set out above, I find that the Town voluntarily chose to submit to a federal forum when it agreed to adjourn the criminal proceeding against Plaintiff until resolution of his § 1983 action. I further find that the Town has waived its right to withdraw its consent to federal adjudication, since its dilatory manner in raising its abstention claim has prejudiced Plaintiff and undermined the efficiency of this court. In this respect, I note that the Town's original decision to adjourn the criminal proceedings reasonably led Plaintiff and the court to expend substantial resources in relation to Plaintiff's § 1983 action. The Town's newly sprung opposition to federal adjudication betrays an indifference to federal proceedings that runs counter to the principles of comity-principles which demand mutual respect between state and federal governments, and which do not compel federal courts to defer to litigation strategies pursued by state defendants in bad faith. I therefore decline to dismiss this case under the doctrine of abstention. n9

IV. Conclusion

Having found that the Town did violate Plaintiff's right to procedural due process, I hereby ORDER an award

of attorneys fees to the Plaintiff as the prevailing party pursuant to § 1988, Title 42 of the United States Code. I further GRANT Plaintiff's application for a declaratory judgment recognizing that the 1990 C/ O was the last validly issued C/ O for his premises and that the Premises will continue to enjoy its status as a nonconforming use until the Town revokes this status in a manner conforming with the requirements of due process. Plaintiff's application for a permanent injunction against the Town from taking any action to punish or prohibit Plaintiff from using the Premises as a two-family dwelling is DENIED. Plaintiff's substantive due process claim is DISMISSED on ripeness grounds. Defendants' motion for summary judgment is DENIED.

SO ORDERED.
Nicholas G. Garaufis
United States District Judge

Dated: January 2, 2003

FOOTNOTES

n1 Under Chapter 68 of the Code of the Town of Islip (the "Town Code"), the Town must, subject to a few provisos, recognize the legality of "any nonconforming use which, at the time such was commenced, was maintainable as a matter of right under the statutes, ordinances and general rules of law then in effect in the Town of Islip." See § 68-14.

n2 Although the parties dispute whether Plaintiff reasonably relied upon the C/ O on file in 1986, this

issue is not essential to the court's determination in this case.

n3 Prior to issuance, a C/ O will generally be kept on file in an unsigned form, and only upon a request for a certified copy, will a clerk sign and issue it. The Building Department "issues" a C/ O any time an individual requests a certified copy.

n4 The Town's criminal proceeding, brought in the name of the People of the Sate of New York, was filed in the Suffolk County District Court.

n5 In this latter respect, the court notes that vested property rights that have been officially recognized by the state and reasonably relied on by the owner are not metaphysical entities that exist independent of legal determinations by the state. Rather, they are recognized and revoked by the state. A statute that provides otherwise in order to circumvent the strictures of the Due Process Clause would raise serious constitutional concerns.

n6 The statute of limitations analysis might be different if Plaintiff's nonconforming use had been terminated by the addition of the "revoking notations" to his 1990 C/ O. However, in this respect, the Town itself argues that the addition of the revoking notations to Plaintiff's 1990 C/ O did not terminate Plaintiff's nonconforming use. Rim Giedraitis, who was commissioner of the Town's building department between 1990 and 2000, testified at his deposition that the notations merely refer prospective home buyers to statements concerning the nonconforming use made in the state court opinion dismissing Plaintiff's Article 78 proceeding. (Shea Decl.,

Ex. G at 77.) Describing the notations, Giedraitis testified: "It simply states ... that there is a court decision regarding this property that affects the use of the property for two family." Giedraitis also stated that the Town's manual, titled "Procedure for Issuing Certificate of Occupancy," requires that the building director sign a C/ O before it may be issued. According to Giedraitis, the 1990 C/ O that included the revoking notations remained on file in an unsigned form until 1997. As a consequence, the revoking notations did not carry any legal effect until they became part of a C/ O that was signed and formally issued. (Id.)

n7 Plaintiff also urges the court to disregard Defendants' abstention argument because Defendants failed to raise the issue in its motion to dismiss, answer and summary judgment motion. However, Defendants' failure to raise this claim at an earlier juncture does not relieve the court of its obligation to raise this prudential doctrine sua sponte.

n8 The Town now asserts that it has delayed the criminal case to allow Plaintiff "to avail himself of his right to challenge any adverse determination concerning the status of his property before the Town's Zoning Board of Appeals." (Letter of December 20, 2002, at 3.) However, Plaintiff has from the beginning steadfastly refused to appeal this matter to the Zoning Board of Appeals and has instead made it clear that he prefers resolution of this matter in the federal courts. As such, I find that the Town's decision to indefinitely adjourn the criminal proceeding was made with full knowledge that Plaintiff sought the adjournments in order to permit this court to rule on his constitutional claims.

n9 I recognize that the Court of Appeals for the Seventh Circuit has established a stricter doctrine of waiver than the one I adopt here. In Barichello v. McDonald, 98 F.3d 948 (7th Cir.1996), the Seventh Circuit interpreted Supreme Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.,477 U.S. 619, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986), to mean that a state may waive abstention only where it expressly urges a federal court to address the merits of a claim. I respectfully disagree with this interpretation of Dayton, and find that the Supreme Court's decision does not establish the inflexible waiver rule suggested by the Seventh Circuit. The issue in Dayton was whether a state defendant's stipulation to federal court jurisdiction constituted waiver of the state's abstention claim. The Court in Dayton first clarified that abstention "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." (Id. at 626). Having made this distinction, the Court then held that the state defendant's stipulation regarding jurisdiction did not amount to a waiver of rights under the principles of comity and abstention. See Id. Finally, the Court justified this decision by distinguishing the case from Hodory and Brown, stating "[in Hodory and Brown,] the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here ..."

No. 03-7066

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of December two thousand three.

NORTON,
Plaintiff-Counter-Defendant-Appellee,

v

TOWN OF ISLIP, THOMAS ISLES, et al.
Defendants-Counter-Claimants-Appellants.

December 5, 2003

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Town of Islip, et al.

Upon consideration by the panel that decided the appeal, it is that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: Laura Bass
Penn Motions Staff Attorney

(2)

Supreme Court, U.S.
FILED
MAY 11 2004
OFFICE OF THE CLERK

No. 03-1281

IN THE

Supreme Court of the United States

TOWN OF ISLIP, NEW YORK, *et al.*,

Petitioners,

v.

HOWARD NORTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is there a compelling reason within the purview of Rule 10 of the Court to grant review on a writ of certiorari of the summary order of affirmance of the Court of Appeals for the Second Circuit, by Order filed on October 9, 2003 (the "Summary Order"), the holding that that the Town did violate plaintiff's right to procedural due process when it issued a certificate of occupancy ("C/O") that contained certain "revoking notations" concerning plaintiff's right to a nonconforming use in his property, and a denial of petitioner's combined motion for rehearing and for rehearing *en banc* filed on December 5, 2003?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

POINT I

PLAINTIFF'S ESTABLISHED PROPERTY RIGHTS DO NOT TERMINATE "BY OPERATION OF LAW", BUT ONLY WITH DUE PROCESS OF LAW 6

POINT II

PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIMS WERE RIPE FOR REVIEW 9

POINT III

THE TOWN WAS OBLIGATED TO PROVIDE PLAINTIFF WITH PRE-DEPRIVATION DUE PROCESS 13

CONCLUSION 15

TABLE OF CITED AUTHORITIES

Page

Cases

Armstrong v. Manzo, 380 U.S. 545 (1965) 13, 14

Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988) 5

DeNicola v. Scarpelli, 546 N.Y.S.2d 630 (2d Cir. 1989) 9

Doe v. Pfrommer, 148 F.3d 73 (2d Cir. 1998) 10

Dougherty v. Town of North Hempstead Board of Zoning Appeals, 282 F.3d 83 (2d Cir. 2002) 9

Ford v. Shalala, 87 F. Supp.2d 163 (E.D.N.Y. 1999) 6

Goldberg v. Kelly, 397 U.S. 254 (1970) 14

Hudson v. Palmer, 468 U.S. 517 (1984) 14

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 7

Loudermill v. Cleveland Board of Ed., 470 U.S. 532 (1985) 6, 13-14

Mathews v. Eldridge, 424 U.S. 319 (1976) 13

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 14

Cited Authorities

Page

Parratt v. Taylor, 451 U.S. 527 (1981) 14

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982) 10, 11

Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985) 13

People v. Minori, 160 Misc. 485 (Justice Ct. 1994) 8

Southview Associates v. Bongartz, 980 F.2d 84 (2d Cir. 1992) *cert. denied*, 507 U.S. 987 (1993) 10

Stephentown Concerned Citizens v. Herrick, 246 A.D.2d 166, 676 N.Y.S.2d 246 (3d Cir. 1998) 7

United States v. Quinones, 313 F.3d 49 (2d Cir. 2002) 12

Weissman v. Fruchtman, 700 F. Supp. 746 (S.D.N.Y. 1988) 11

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9, 10, 11

Zinermon v. Burch, 494 U.S.113 (1990) 13

Cited Authorities

Page

United States Constitution:

Fifth Amendment 11

Statutory Authorities:

Federal

42 U.S.C. § 1983 ..... 6, 10

State

Islip Town Code § 68-14 1

Islip Town Code § 68-15 ..... 7, 8

Islip Town Code § 68-15(B) 7

Islip Town Code § 27-96 8

Islip Town Code § 68-20 ..... 8, 12

Islip Town Code § 68-39 8

Islip Town Code § 68-40 ..... 3, 8

STATEMENT OF THE CASE

Plaintiff (respondent) is the owner of a residential dwelling in New York (the "Premises"), which, as early as 1933 and continuing to the present, was improved with a two-family dwelling (JA[1] 62-65). When the two-family use was commenced, it was maintainable as a matter of right under the statutes, ordinances, and general rules of law then in effect in the Town of Islip ("the Town") (JA 62). Although the Town later adopted a zoning ordinance (the "Town Code") which zoned the Premises in an area restricted to "single-family detached dwellings, the Premises' established two-family use was permitted to continue as a "Legal Nonconforming Use" under § 68-14 of the Town Code (JA 62, 63, 471). Under § 68-15 of the Town Code, any established legal nonconforming use is entitled to continue, in *perpetuity* (except for certain specific uses not relevant herein) unless certain specific events enumerated in that code section are established (JA 63, 471, 472). Under § 68-20 of the Town Code, a real property's legal nonconforming use *must* be reflected in the property's certificate of occupancy that is issued by the Town (JA 473). Section 68-20 of the Town Code further provides that any certificate of occupancy specifying the legal nonconforming use "*shall constitute presumptive use* in any action or proceeding" (JA 473) (emphasis added).

As required under § 68-20 of the Town Code, the Town officially certified the establishment and continued existence of the Premises' legal nonconforming use in various certificates of occupancy issued on various dates (JA 63, 100, 103, 109, 111).

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1. "JA" references are to the Joint Appendix.

Sometime after plaintiff's purchase of the Premises, a Town official advised plaintiff that he needed to obtain a rental permit from the Town if he wanted to rent the Premises (JA 82). Accordingly, in 1988, plaintiff submitted an application to the Town for a two-family rental permit (JA 66). The Town, however, returned plaintiff's application with a letter dated May 14, 1988 stating that plaintiff "must go before the Board of Appeals, with regard to your nonconforming use" (JA 66). No other explanation of the Town's refusal to issue a rental permit to plaintiff was given (JA 66). The Town did not take any official action at that time to terminate or revoke the established status of the Premises' legal nonconforming use or the Premises' last-issued certificate of occupancy certifying such permitted usage (JA 67). To the contrary, the Town issued and provided plaintiff with another certificate of occupancy for the Premises, again certifying the Premises' established status as a legal nonconforming two-family dwelling (JA 67, 103). Plaintiff commenced an Article 78 proceeding in New York State Supreme Court, seeking a judgment directing the Town to issue a rental permit to him (JA 67), in which the Town argued that the Premises no longer constituted a legal nonconforming use as a result of being vacant for a period in excess of one year (JA 67-68), but acknowledged that their legal "position" was not based upon any actual revocation or termination by the Town, but that the issue must be determined by the Town's Zoning Board of Appeals (JA 68). The Court denied plaintiff's petition, but offered no opinion as to the status of the Premises' legal nonconforming use (JA 68-69).[2] The Town did not initiate any judicial or

2. The District Court (Seybert, J.), specifically found that the New York Supreme Court "offered no opinion as to the status of the premises' legal nonconforming use as a two-family residence." (JA 34).

administrative action before the Zoning Board of Appeals prior to 1997 to revoke the Premises' legal nonconforming use (JA 70-71) and the Premises continued to be taxed by the Town as a legal two-family residence (JA 65).

In 1997, the Town served Plaintiff with an Accusatory Instrument charging him with wrongfully violating § 68-40 of the Town Code (the "Criminal Proceeding"), which states "No occupancy or use shall be made of land or a building that is not consistent with the last-issued certificate of occupancy for such building or use of land unless a permit is secured." (JA 71-72) Thereafter, the Town issued a new C/O for the Premises ("the 1997 C/O") that included the "Revoking Notations". The Town's 1997 Actions in issuing the 1997 C/O containing the Revoking Notations were made without providing plaintiff with any prior notice or opportunity to be heard (JA 73).

REASONS FOR DENYING THE PETITION

The Petition should be denied because there is no compelling reason within the purview or character of Rule 10 of the Court offered by Petitioner that warrants the grant of certiorari in this case. Instead, the Town argues that "This Court's intervention is required to avoid the "federalization" of local zoning disputes" (Petition, at 8). That rationale, even if applicable, would not be a sufficiently compelling reason to grant certiorari under the circumstances of this case. However, this case does not involve a zoning dispute, and Petitioner mischaracterizes plaintiff's claim, which is rooted in the Town's violation of plaintiff's constitutionally protected procedural due process rights. Plaintiff has not sought a permit for the development of his property, or any other zoning approval from the Town, such

that the exhaustion of any available administrative remedies could result in the approval of his proposed land use. Here, plaintiff had what he wanted, an established property right to use his dwelling as a two family residence, long recognized by the Town. His lawsuit seeks redress for injury to the process, guaranteed by the Constitution, not economic damages. In revoking plaintiff's lawful certificate of occupancy permitting such nonconforming use, the Town failed to provide plaintiff with the most basic due process protections, prior notice and an opportunity to heard, and failed to correct its own errors long after it knew or should have known that it had violated plaintiff's constitutionally protected rights. Instead, the Town commenced and continued a criminal prosecution of plaintiff that was both factually and legally flawed from the outset.

The Court of Appeals agreed with the central thesis of plaintiff's complaint, that (i) the Town did violate plaintiff's right to procedural due process, (ii) plaintiff was entitled to a declaratory judgment recognizing that the 1990 C/O was the last validly issued C/O for the premises, (iii) that the Premises will continue to enjoy its status as a legal nonconforming use unless and until the Town revokes its status in accordance with the due process requirements of the Constitution, and (iv) plaintiff is entitled to his attorneys' fees and costs. The District Court rejected the Town's arguments that (1) plaintiff did not possess a protected property interest, (2) plaintiff's nonconforming use terminated "by operation of law", without any affirmative act by the Town ("*the Town's argument is devoid of any merit*"), and that (3) plaintiff had the burden of proving lack of abandonment as a condition precedent to being afforded due process by the Town ("*This argument completely misconstrues the spirit of the Due Process Clause*").

Further, the District Court rejected the Town's claims that (i) plaintiff was not entitled to pre-deprivation due process based upon the *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988) application of the "random and unauthorized" conduct rule ("*the court can find no conceivable basis for the Defense's application of Brady*"), and (ii) the availability of post deprivation judicial review bars a procedural due process claim. Finally, the District Court not only rejected the Town's untimely Younger Abstention argument, but plainly noted its displeasure with the Town's actions in this case, writing:

> This eleventh-hour request strikes the court as a dilatory tactic intended to further prolong a course of litigation that has needlessly consumed a vast amount of resources-all because the Town has been unable to afford Plaintiff the most rudimentary elements of due process . . .
>
> . . . The Town's newly sprung opposition to federal adjudication betrays an indifference to federal proceedings that runs counter to the principles of comity-principles which demand mutual respect between state and federal governments, and which do not compel federal courts to defer to litigation strategies pursued by state defendants in bad faith. [Petition 24a]

In sum, while as a result of this action, the Town may be required to revise its Town Code, as well as its policies and practices, in order to provide property owners with a lawful procedure for the termination of an established nonconforming use, and to avoid a re-occurrence of the procedural due process violations found to have occurred in

this case, that is not a sufficient basis for disturbing the Summary Order. To the contrary, that is the public benefit for which Section 1983 was enacted to encourage.

POINT I

PLAINTIFF'S ESTABLISHED PROPERTY RIGHTS DO NOT TERMINATE "BY OPERATION OF LAW", BUT ONLY WITH DUE PROCESS OF LAW

It is undisputed that the plaintiff's two-family home constituted a legal nonconforming use prior to a fire that damaged the Premises in 1984 (JA 500-01), and that such lawful usage was certified by the Town in a number of certificates issued by the Town both before and after 1984, and as recently as 1990 (JA 111). The Town argues that plaintiff must first affirmatively establish that his established legal nonconforming use has not been discontinued or abandoned in order to be afforded due process of law in connection with the Town's termination of his established nonconforming use (Petition, at 11).

This notion, which is at the center of the Town's arguments, flies in the face of the requirements of due process found in the Constitution, is irrational, and is unsupported by the law or the facts. There is no more settled principle of constitutional law that "Once a constitutionally protected property interest exists, procedures utilized to reduce or terminate the protected property interest must comport with the constitutional requirement of due process." *Ford v. Shalala*, 87 F. Supp.2d 163, 175-76 (E.D.N.Y. 1999); *Loudermill v. Cleveland Board of Ed.*, 470 U.S. 532, 541-542 (1985) (protected property rights cannot be deprived except pursuant to constitutionally adequate procedures).

The District Court noted that the Town "provided no legal support for the proposition that the property right . . . may terminate by operation of law, without any affirmative act by the Town" (JA 502). The District Court interpretation was quite correct. Plaintiff has referred to this as the Town's "evaporation theory".

After providing that "any legal nonconforming use may be continued" in perpetuity (except for certain uses not relevant herein), § 68-15(B) merely identifies the substantive events "the standards" which, if proven, would result in the termination of a previously established legal nonconforming use, which standards include abandonment, defined as the "discontinuance of any nonconforming use for a period of one (1) year". However, § 68-15 does not constitute or provide any procedural due process whatsoever, as to how that substantive standard is to be determined. *See* § 68-15 (JA 471-472). In other words, that section merely establishes a "for cause" standard for the deprivation of a vested property right. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (the hallmark of property "is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"). In no way can § 68-15 be read to imply an "automatic" termination of an existing and recognized property right, without any official determination and in the absence of a due process procedure. *See Stephentown Concerned Citizens v. Herrick*, 246 A.D.2d 166, 676 N.Y.S.2d 246 (3d Dept. 1998) (zoning restrictions affecting nonconforming uses are to be strictly construed in favor of the property owner). Nowhere in § 68-15 does it state or imply that its provisions are self-effectuating, or that they apply "by operation of law," and if they did, that section would be unconstitutional for the same reasons as are the Town's 1997 Actions.

Moreover, a reading of other provisions of the Town Code defeats the Town's argument that § 68-15 is self-effectuating such that an established nonconforming use can be lost "by operation of law," notwithstanding lawfully issued and outstanding certificates of occupancy issued by the Town to the contrary. Those provisions provide that (i) any permitted use, including specifically an established legal nonconforming use, shall be recited in a Town issued certificate of occupancy (§§ 68-39 and 68-20); (ii) no occupancy or use shall be made that is not consistent with the last-issued certificate of occupancy (§ 68-40); (iii) any occupancy made of a building that is not consistent with the last issued certificate of occupancy is prohibited (§ 68-40), subjecting an owner to criminal prosecution (§ 27-96); and that (iv) a certificate of occupancy issued by the Town containing an endorsement specifying the legal nonconforming use shall constitute presumptive use in any action or proceeding brought under the Town Code (§ 68-20) (JA 473). Clearly, the provisions of the Town Code, taken together, compel the conclusion that an established legal nonconforming use does not simply evaporate "by operation of law." Established nonconforming uses are neither "tenuous" nor "characteristically different" than other property rights, at least under this Town Code. The case law cited by Petitioner either do not accurately reflect New York law, or are otherwise inapposite and inapplicable to this case.

Clearly, lawfully issued certificates of occupancy certifying the permitted uses of a premises are meant to be relied upon not only by existing and prospective landowners, but by the Town itself. *See People v. Minori*, *supra*, 160 Misc. at 485, 487 (Justice Ct. 1994) ("once issued and delivered, [a certificate of occupancy] cannot be recalled, cancelled or vacated at the whim of the homeowner or at the whim of the

Building Department. A certificate of occupancy is a document which must be relied upon in good faith, absent fraud or deceit.") (internal citation omitted); *DeNicola v. Scarpelli, supra*, 546 N.Y.S.2d at 630 (2d Dept. 1989) ("certificates of occupancy . . . establish the legality of the use of the premises [as specifically stated therein]").

As a corollary proposition to its evaporation theory, the Town argues that since plaintiff's established property rights can simply evaporate without any action or determination by the Town accompanied by due process, it is plaintiff's burden to demonstrate, as a condition precedent to being entitled to due process, that plaintiff (*and* his predecessor) did not abandon the nonconforming use of the property, and that the Town has no substantive grounds for terminating plaintiff's established property rights. It is a meritless, irrational argument, intended to avoid its burden of proof of demonstrating that it has obeyed the strictures of the Constitution, which finds no support in the Town Code, the Constitution, or case law.

POINT II

PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIMS WERE RIPE FOR REVIEW

Two District Court Judges held plaintiff's procedural due process claim to be ripe (JA 499-500) (JA 38) (JA 53). The Town's argument is that plaintiff's claims are not ripe because plaintiff never appealed administratively to the Town's ZBA (Petition, at 19), citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and *Dougherty v. Town of North Hempstead Board of Zoning Appeals*, 282 F.3d 83 (2d Cir. 2002). It is beyond

dispute that there is absolutely no requirement that a plaintiff exhaust state administrative or judicial remedies before filing a § 1983 action. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 500-01 (1982) ("this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position . . .") *Doe v. Pfrommer*, 148 F.3d 73, 78 (2d Cir. 1998) (recognizing categorical no-exhaustion rule).

There are two prongs to the ripeness approach as interpreted by this Court in *Williamson, supra*, 473 U.S. 172. First is that the administrative initial decision maker's decision must have been final ("finality prong"); second, that the property owner must have unsuccessfully sought just compensation through any available state procedure ("the just compensation prong").

However, such resort to state procedure is not required where the claim is not for a taking. *Southview Associates v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993). There, Second Circuit stated in pertinent part that:

> a substantive due process claim premised on arbitrary and capricious government conduct, however, is subject to *only* the final decision prong of the *Williamson* ripeness test. The requirement that a plaintiff seek compensation in state court is . . . derived from the Takings Clause, . . . to which a substantive due process claim, premised on arbitrary and capricious government conduct, is largely unrelated.

[Emphasis added.] 980 F.2d at 96-97.

Therefore, a purely procedural due process claim, like the one here, where there is no claim for "just compensation", is not subject to the just compensation prong of *Williamson*. Plaintiff's claim was successfully adjudicated with only declaratory relief. Plaintiff's complaint (JA 14-25) never pled any taking or made a Fifth Amendment "Just Compensation Clause" claim. (Further, by stipulation, he previously withdrew even the seeking of any monetary damages.) (JA 497) No economic injury is at issue in this procedural due process case. Accordingly, the just compensation prong of the *Williamson* case does not apply.

As noted by the District Court (JA 37), *Williamson* delineates that "the finality requirement is concerned with whether *the initial decision maker* has arrived at a definitive position on the issue that inflicts an actual, concrete injury. Thus, in *Weissman v. Fruchtman*, 700 F. Supp. 746, 755 (S.D.N.Y. 1988), that court held that exhaustion of administrative remedies was not required in order for a procedural due process claim to ripen.

Here, the actions suggested by the Town, are clearly remedial in nature, a classic administrative remedy of the type the "no exhaustion" doctrine enunciated by *Patsy*, *Williamson*, and their progeny expressly held do not apply to § 1983 actions. Applying these concepts, the District Court properly reasoned:

> While the Board of Appeals could determine whether or not the property's status as a legal non-conforming use was lost or forfeited, this determination in no way would redress plaintiff's complaint that he has been deprived of property without due process of law in violation of the

> Fourteenth Amendment. In other words, even if plaintiff were to obtain a favorable decision from the Board of Appeals, his complaint that he has been deprived of property by means of an unconstitutional process still would survive. *See generally Goldberg v. Kelly*, 397 U.S. 254 (1970).

(JA 38-39.)

Additionally, plaintiff did not have the right to file an appeal to the ZBA. There was never any written decision or determination by a Town official filed by the Town with the Town Clerk that would have permitted plaintiff to initiate an appeal to the ZBA (JA 492). For years, the Town argued that the ZBA had original jurisdiction to hear an application under Town Code § 68-20 to establish a nonconforming use, and *that* was the reason plaintiff should go to the ZBA. This argument was not raised (and therefore abandoned) by the Town on appeal to the Second Circuit, but seems to be suggested in the Petition (Petition, at 19). This section (§ 68-20), which applies only to applications to establish a nonconforming use not previously recognized by the Town, facially does not even apply here, since plaintiff's nonconforming use was already established and long recognized by the Town). The Town has never explained its own failure to pursue any process or procedure through the ZBA to revoke or terminate plaintiff's nonconforming use.

Here, the District Court made the *fact-specific* determination of ripeness required by *United States v. Quinones*, 313 F.3d 49, 58 (2d Cir. 2002) (not once, but twice), and the Petition raises no compelling reason for this Court to review this issue.

POINT III

THE TOWN WAS OBLIGATED TO PROVIDE PLAINTIFF WITH PRE-DEPRIVATION DUE PROCESS

Petitioner argues that the lower courts should have discerned that the alleged availability of post deprivation review comported with due process (Petition, at 21), and satisfies the *Matthews v. Eldridge* balancing test.

The District Court held that the Town had an obligation to provide pre-deprivation due process (JA 505). In its simplest formulation, due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Patterson v. Coughlin*, 761 F.2d 886, 890 (2d Cir. 1985) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Applying these fundamental standards, this Court "consistently has held that some form of hearing is required *before* an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). It is only where a pre-deprivation hearing is unduly burdensome in proportion to the interest at stake or where the State is truly unable to anticipate and prevent a random deprivation of an interest, that post deprivation remedies might satisfy due process. *Zinermon v. Burch*, 494 U.S.113 at 132 (1990). Thus, absent some exigency that requires summary action by the state, or circumstances that render a pre-deprivation hearing impossible as a practical matter . . . "the opportunity to be heard before the state deprives an individual of life, liberty or property is still in the "root requirement" of the due process clause." *Patterson*, 761 U.S. at 892 (quoting *Loudermill v. Cleveland Board*

of Ed., 470 U.S. 532 (1985)); *see also Goldberg v. Kelly*, 397 U.S. 254 (1970); *Armstrong*, 380 U.S. 545; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Parratt v. Taylor, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984), represent the exceptional situation (unlike the case at bar) where the State simply cannot provide a pre-deprivation hearing because the deprivation complained of occurred through some unforeseeable "random and unauthorized" conduct. In this case, the Town has not claimed (nor can it) that some exigency ever existed such that a pre-deprivation hearing was impossible as a practical matter at any point in time. Further, while not material to the outcome of the Petition, the Town's claim that plaintiff claims only to have been deprived of a property right, not a liberty interest (Petition, at 20), is inaccurate (JA 38).

Therefore, any right that plaintiff may have had to appeal the Town's revocation of his nonconforming use (which the District Court found occurred in 1997, when the Town issued a new C/O containing the revoking notations) (Petition, at 17a), did not negate the Town's obligation to provide him with pre-deprivation due process. Further, the Town has not demonstrated, and the record does not support, its claim that affording plaintiff and others with pre-deprivation due process would impose an unreasonable administrative burden upon the Town. Indeed, as the District Court noted, section 68-20 of the Town Code, dealing with the establishment of a nonconforming use, already requires the Town to hold a hearing prior to approving new nonconforming use applications. ("*It is simply not credible that the Town can hold these preapproval hearings for unestablished nonconforming uses, but cannot hold a hearing prior to*

terminating a vested property right that has already been officially recognized") (Petition, at 19a, 20a). Accordingly, the Petition raises no compelling issue that would warrant review of this issue by this Court.

CONCLUSION

For all of the reasons set forth above, the Court should deny the Petition.

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IN THE

Supreme Court of the United States

TOWN OF ISLIP, THOMAS ISLES, AS COMMISSIONER OF THE TOWN OF ISLIP DEPARTMENT OF PLANNING AND DEVELOPMENT AND CARL P. MALTESE, AS DIVISION DIRECTOR OF THE DIVISION OF BUILDING OF THE TOWN OF ISLIP DEPARTMENT OF PLANNING AND DEVELOPMENT, AND AS TOWN OF ISLIP DIRECTOR OF BUILDING AND HOUSING, PETITIONERS

v.

HOWARD NORTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

BD. OF REGENTS V. ROTH, 408 U.S. 564 (1972) 7

BOWER ASSOCIATES V. TOWN OF PLEASANT VALLEY, - N.Y.2D -, - N.Y.S.2D -, 2004 WL 1064237 (MAY 13, 2004) 2

BRADY V. TOWN OF COLCHESTER, 863 F.2D 205 (2D CIR. 1988) 10

CELENTANO V. CITY OF WEST HAVEN, 815 F. SUPP. 561 (D.CONN 1993). 1

GLENDON ENERGY CO. V. BOROUGH OF GLENDON, 836 F. SUPP. 1109 (E.D.PA. 1993) 2

LICARI V. FERRUZZI, 22 F.3D 344 (1ST CIR. 1994)..... 10

MATHEWS V. ELDRIDGE, 424 U.S. 319 (1976)..... 10

NATIONAL PARK HOSPITALITY ASS'N V. DEPARTMENT OF INTERIOR, 538 U.S. 803 (2003)..... 4

NESTOR COLON MEDINA V. CUSTODIO, 964 F.2D 32 (1ST CIR. 1992)..... 10

PATSY V. FLORIDA BOARD OF REGENTS, 457 U.S. 496 (1982) 5

PFZ PROPERTIES V. RODRIGUEZ, 928 F.2D 28 (1ST CIR. 1991)..... 10

PHILLIPS V. COMM. OF I.R.S., 283 U.S. 589 (1931) 9

REGIONAL RAIL REORGANIZATION ACT CASES, 419 U.S. 102 (1974) 4

SAMERIC CORP. OF DELAWARE, INC. V. CITY OF PHILADELPHIA, 142 F.3D 582 (3D CIR. 1998) 1

SULLIVAN V. TOWN OF SALEM, 805 F.2D 81 (2D CIR. 1986) 1

VILLAGE OF EUCLID V. AMBLER REALTY CO., 272 U.S.365 (1926) 9

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION V. HAMILTON BANK OF JOHNSON CITY, 473 U.S. 172 (1985) 5

OTHER AUTHORITIES

42 U.S.C. §1983 .....1, 2

N.Y. Civ. Prac. L. & R. Art. 78 5

N.Y. Town Law 267-a 7

N.Y. Town Law 267-b 6

U.S. Const. Amend., V 7

U.S. Const. Amend., XIV, § 1 1

REPLY BRIEF FOR PETITIONERS

In opposing the Town's petition, the respondent acknowledges what is at stake here – namely, the "federalization" of local zoning disputes, but argues that is not a compelling enough reason to interest this Court:

> the Town argues that "This Court's intervention is required to avoid the "federalization" of local zoning disputes" (Petition, at 8). That rationale, even if applicable, would not be a sufficiently compelling reason to grant certiorari under the circumstances of this case.

Brief in Opposition to Petition at 3. We disagree.

1. The unprecedented "federalization" of local zoning disputes is certworthy. While this Court has not yet spoken, it cannot be gainsaid there is an ever-increasing willingness of landowners to convert ordinary land use disputes into a "federal" case, typically under the guise or rubric of a Section 1983 action (42 U.S.C. §1983). *See, e.g., Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 597 (3d Cir. 1998) (stressing "the importance of the finality requirement and our reluctance to allow the courts to become super land-use boards of appeals"); *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986) ("federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations by the circuit's many legislative and administrative agencies"); *Celentano v. City of West Haven*, 815 F. Supp. 561 (D.Conn 1993) ("[t]o exempt

[plaintiff]'s claim from the *Williamson* final decision requirement . . . would permit a disgruntled landowner to by-pass or preempt the local agency charged with adjudicating the validity of zoning designations in favor of a federal district court"); *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1118 (E.D.Pa. 1993) ("[plaintiff] should not be able to circumvent the well-established procedures for challenging the validity of a zoning ordinance by instead using a federal lawsuit").

Just last week, the New York Court of Appeals lamented that state courts – to no lesser or greater degree than federal courts – should be hesitant to allow local land use disputes to be transformed and prosecuted as constitutional claims under the guise of Section 1983. *Bower Associates v. Town of Pleasant Valley*, — N.Y.2d —, — N.Y.S.2d —, 2004 WL 1064237 (May 13, 2004) ("'42 USC § 1983 is not simply an additional vehicle for judicial review of land-use determinations' [internal citation omitted]. In the same vein, federal courts dismissing section 1983 land-use claims have repeatedly noted that they do not function as zoning boards of appeal, or substitute for state courts interpreting land-use regulations"). The grant of certiorari in this case will permit this Court to stem this tide in the federal courts, and to insist on strict adherence to *ripeness* and other prerequisites to the assertion of land use-based Section 1983 claims in the federal courts. This is particularly compelling in the area of local zoning laws, which epitomize the need for such disputes to be resolved within the province of state and local governmental bodies and, if necessary, through available state court remedies – not in the federal courts.

In the case at bar, the Town was summarily adjudged to have violated the plaintiff-landowner's *procedural due process* rights, even though by all accounts the plaintiff failed – and still refuses to this very day – to avail himself of available administrative and state court remedies to redress any alleged loss or deprivation of his *legal, non-conforming use*, the very nature of which is in direct contravention of the Town's current zoning laws. (Hence, the term *legal, nonconforming use.*) The summary judgment ruling in this case sweeps aside, and is a virtual affront to, important *ripenes* and *due process* hurdles rooted in the very Due Process Clause (U.S. CONST. AMEND., XIV, § 1) itself.[1] This is all the more troubling where, as here, the entire Due Process violation supposedly occurred here because a local Town Building Official made a simple and ordinary notation on the plaintiff's certificate of occupancy (C/O), the import and effectiveness of which was – and still is – subject to further consideration and available remedies before the Town's local Zoning Board of Appeals (ZBA) as well as before the state courts. Plaintiff simply and inexcusably chooses not to pursue those remedies. *See* Petition at 3-6, 18-20.

2. The failure of plaintiff's due process claims to pass muster under *ripeness* or *finality* grounds is manifest here. Notably, the lower courts (*see* n. 1 *supra*) inexplicably held that plaintiff's

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[1] The Petition further explains why the cursory and summary nature of the second circuit's affirmance in this action neither prohibits, nor should deter, this Court's ultimate decision whether or not to grant certiorari in this case. *See* Petition at 10.

procedural due process claim was ripe, even though his *substantive* due process claim was not ripe. But that strained conclusion cannot be justified based on either the substantive laws, or the material facts, relevant to the outcome of this Section 1983 action. *See* Petition at 18-20.

This Court has recognized that "[t]he ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026 (2003)(internal citation omitted). Moreover, the existence of a ripe controversy is so important that courts "cannot [even] rely upon concessions of the parties and must determine [for themselves] whether the issues are ripe." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). This Court's adherence to, and insistence upon, the requirement of a *ripe* and *final* controversy in relation to land use-based Section 1983 lawsuits is a necessary and effective means of stemming, or at least exercising a degree of control over, the ever-rising tide of such cases.

Here, by all accounts, including the respondent's own Statement of the Case, an application to the Town's ZBA was (and still is) available to respondent concerning the very issue raised in his civil rights lawsuit – namely, whether his property continues to enjoy a *legal, nonconforming use*, despite the apparent loss or termination of such use by reason of an intervening fire and abandonment of such use, and despite the Town's so-called "revoking notation" made to the plaintiff's C/O. Likewise, by all accounts,

respondent was specifically and repeatedly advised by the Town of the availability of a ZBA petition (Joint Appendix 354-355; 377; 463-467). Further, even if the respondent's ZBA petition were denied, the respondent could have then availed himself of yet further available state court remedies under N.Y. Civ. Prac. L. & R. Art. 78. *See* Petition at 21.

To be sure, there is a seeming conflict between the rule that civil rights actions do not require exhaustion of administrative remedies (*Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557 (1982)), and the concern that federal courts should not become embroiled in the myriad proceedings and disputes inherent in local zoning matters, so as to avoid the transformation of the federal courts into "super zoning boards of appeals". This too is worthy of the Court's attention. The conflict is reconcilable by nothing less than strict adherence to ripeness and finality. This Court stated as much in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985). Significantly, while *Williamson* was decided in the Fifth Amendment Takings context, this Court's holding and analysis in *Williamson* that an available, non-appellate original petition to a ZBA renders a claim non-final (*id.*) should be applied with equal vigor to land-use based Section 1983 claims purportedly arising under the Due Process Clause.

3. There is no merit to the respondent's hollow contention, made in passing in its Brief in Opposition to the Town's Petition (*see* Br. in Opp. to Pet. at 12), that petitioners failed before the second circuit to "raise (and therefore abandoned)" the

assertion that the ZBA had (and still has) original, non-appellate jurisdiction over *legal, nonconforming use* rights. Petitioners specifically raised as Point I of their Appellant's Brief before the circuit court that plaintiff's due process claims are not ripe or final because "a truly 'final' and 'full' determination [had not] been sought through a simple application to the ZBA" (Appellant's Br. in 2d Cir. at 17). Moreover, when plaintiff urged on appeal in the second circuit that the "Zoning Board of Appeals" by name possesses only appellate jurisdiction, the Town responded to and directly dispelled that erroneous contention. The Town indeed responded in its Reply Brief before the second circuit that under controlling New York Town Law, the ZBA has *original jurisdiction* over, *inter alia*, legal, nonconforming use rights and determinations affecting its local citizens, including over the plaintiff's dispute in this case (Appellant's Reply Br. in 2d Cir. at 9-11[2]).

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[2] The Town argued (emphasis in original):

> under N.Y. Town Law, the Islip ZBA's jurisdiction is *not* limited to deferential review of an administrative official's finding. N.Y. Town Law specifically provides that the ZBA is the ultimate decisionmaker and that when it renders a decision it is as if the administrative official had rendered the decision. *See* N.Y. Town Law 267-b (the ZBA shall make determinations "*as in its opinion ought to have been made ... and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken*").
>
> Additionally, as the Practice Commentary to the Town Law explains with respect to special permits, but which is equally applicable to nonconforming uses, in such circumstances the

4. Further, in a virtual affront to *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), which embodies a *strict entitlement test*, the lower courts entirely dispensed with the requirement that the plaintiff-landowner must *affirmatively prove* his entitlement to a legal, nonconforming use as the *sine qua non* of an actual constitutional violation. Instead, the lower courts permitted the plaintiff to simply rest on a bare *presumption*,[3] coupled with plaintiff's unprecedented and prejudicial assertion of the Fifth Amendment privilege against self-incrimination (U.S. CONST., AMEND. V) as to the very existence or entitlement to maintain his alleged legal, nonconforming use. Yet that is precisely the anomaly sanctioned by the lower courts in this case.

The insistence that a landowner, at the very least, affirmatively prove that he or she possesses a

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jurisdiction of the ZBA is "*original*" and not "appellate." Rice McKinney's Prac. Comm., N.Y. Town Law 267-a (Suppl. 2003) p. 189; *cf.* Town Law 267-a(13)(b) (empowering the ZBA to enter default judgments "[i]n exercising its appellate jurisdiction only"). The ZBA thus most certainly "participate[s]" in the "decisionmaking." *Williamson, supra.*

[3] As explained in the Petition, the *presumption* did not even properly apply here. Petition at 15-16. Indeed, plaintiff's invocation of the Fifth Amendment was even more incredible given that under controlling principles of state law, and as explicitly indicated on the C/O's themselves, the indication of zoning status such as nonconforming use on a C/O cannot be relied upon for assurance that plaintiff has a vested nonconforming use in perpetuity or until affirmatively "revoked" by the Town. Petition at 15-16.

vested or *protectible property right*, is also deserving of this Court's review. This is particularly so where, as here, pre-existing or *nonconforming* use rights are at stake. Emphasized in the Town's Petition, and unanswered by the respondent, is that the very aim of state and local law is to "extinguish" such nonconforming uses over time, since they are by definition *nonconforming* to the Town's current zoning laws. *See* Petition at 12-15. The question of how long such *nonconforming* rights continue, whether they can be constitutionally lost or extinguished over time by virtue of naturally and inevitably occurring events (*i.e.*, the properties will eventually become run-down, unfit for use, the nonconforming use is eventually terminated, or the structure is damaged by fire), and whether the federal constitution imposes a burden upon local governments and municipalities to continually re-canvass all pre-existing structures to detect whether a nonconforming use has terminated as a predicate to a full "pre-deprivation" process, are all matters critically deserving of this Court's attention.[4]

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[4] The Town Code provisions analyzed by the district court are typical of zoning laws, which define a *limited* right to continue a pre-existing use which was rendered nonconforming upon enactment of a zoning law. The Town Code, §68-15 (quoted in the district court's summary judgment decision), indicates that such nonconforming uses can only be continued for so long as they have not been abandoned, a fire has not occurred, or the use changed. The district court's interpretation of this provision, that it does not define a *limited* right to continue a nonconforming use and merely defines what would constitute "just cause" to affirmatively terminate the nonconforming use rights upon a full hearing, was made as a matter of legal construction of the words of the statute, and was not a factual determination. This strained legal interpretation of the statute does not impede in any manner this Court's ability to review this case or the statute, particularly when

The legal status and effect of nonconforming use rights is a particularly timely matter for this Court to review, given that zoning laws did not become widespread in large suburban areas until after World War II,[5] and the structures pre-existing such zoning laws are nearing the end of their useful lives, to the extent that has not occurred already.

5. Respondent's Brief in Opposition to the Petition refers to a criminal proceeding. Petitioners thus hasten to reiterate that this is not a deprivation of a due process "liberty" case. The criminal summons issued to respondent never led to an arrest or custody, and the respondent has specifically withdrawn all claims for monetary damages.

6. Lastly, respondent vainly contends that absent exigent circumstances, pre-deprivation hearings are always required by the Due Process Clause regardless of the property right at stake. Respondent simply ignores, as did the lower courts in this case, this Court's express admonishment in *Phillips v. Comm. of I.R.S.*, 283 U.S. 589, 596-597 (1931), that "[w]here only

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nothing in the statute refers to "just cause" or anything else implicating an affirmative revokation or termination upon notice or a hearing.

[5] New York City, for example, adopted the first comprehensive zoning code for an entire city in 1916. This Court approved of such land use regulation in *Village of Euclid v. Ambler Realty Co.*, 272 U.S.365, 47 S.Ct. 114 (1926), which gave birth to the Euclidian zoning era. Smaller municipalities, and specifically suburban communities which experienced exponential growth after World War II, enacted comprehensive zoning codes thereafter.

property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." Seventy-three (73) years later, and after the advent and near passage of the Euclidian zoning era, this Court should affirm that the availability of post-deprivation review, particularly in the ever-rising tide of Section 1983 land use cases, readily satisfies the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing test which governs all Due Process inquiries. *See, e.g., Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994); *Nestor Colon Medina v. Custodio*, 964 F.2d 32 (1st Cir. 1992); *PFZ Properties v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991); *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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